~~4485~~ No. 4887

United States Circuit Court of Appeals

For the Ninth Circuit.

1479

J. W. DUNFEE,

Appellant,

vs.

C. A. TERWILLIGER, on Behalf of Himself and All Other Stockholders of the ORLEANS MINING AND MILLING COMPANY, a Corporation, Similarly Situated,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Nevada.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

Mr. AUGUSTUS TILDEN, First National Bank Bldg., Ocean Park, California, and Mr. JNO. F. KUNZ, Reno, Nevada,
For the Plaintiff in Error.

Messrs. COOKE & STODDARD, Reno, Nevada,
For Defendants in Error. [1*]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B–39.

C. A. TERWILLIGER, on Behalf of Himself and All Other Stockholders of the ORLEANS MINING AND MILLING COMPANY, a Corporation, Similarly Situated,
Plaintiff,

vs.

J. W. DUNFEE, ORLEANS MINING AND MILLING COMPANY, a Corporation, J. W. DUNFEE, E. CARTER EDWARDS and CHARLES ELLSWORTH, Directors of Said Corporation, and ORLEANS MINING AND MILLING COMPANY, a Corporation,
Defendants.

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*Page-number appearing at foot of page of original certified Transcript of Record.

COMPLAINT.

Comes now the plaintiff above named complaining on behalf of himself and all other stockholders of the Orleans Mining and Milling Company, a corporation, similarly situated, and for cause of action plaintiff alleges and shows to the Court:

I.

That the defendant, Orleans Mining and Milling Company, at all times herein mentioned from and after September 16, 1916, was and now is a corporation duly created, organized and existing under the laws of the State of Arizona, with its principal Nevada office and place of business at Goldfield, in Esmeralda County in said state, and owning real and personal property and mining rights in Hornsilver Mining District in said Esmeralda County; that said corporation was and is capitalized for one million shares of the par value of $1.00 per share, and the [2] shares thereof are nonassessable; that 600,202 shares and upwards are issued and outstanding; that the objects and purposes for which said corporation was formed were to engage in mining and mine operations, and particularly mining and developing the leasehold mining estate hereinafter mentioned; that J. W. Dunfee, E. Carter Edwards, C. A. Terwilliger and Charles Ellsworth were and are the duly elected, qualified and acting Directors of said corporation; that the said defendant, J. W. Dunfee, was and is the duly elected, qualified and acting President, General Manager and Treasurer, the said plaintiff, C. A. Terwilliger, was and is the duly elected, quali-

fied and acting Vice-president, and the said E. Carter Edwards was and is the duly elected qualified and acting Secretary.

II.

That at all times as herein mentioned and at the time of the commencement of this suit the said Orleans Mining and Milling Company was and now is a citizen and resident of the State of Arizona, and said defendants, J. W. Dunfee, E. Carter Edwards, Charles Ellsworth and Orleans Hornsilver Mining Company were and now are citizens and residents of the State of Nevada; that this suit is not collusive one to confer on a federal court jurisdiction and cause of which it would not otherwise have cognizance, that the amount in controversy, exclusive of interests and costs, exceeds $3,000.00.

III.

That at all times herein mentioned since on or about July 23, 1921, the said defendant, Orleans Hornsilver Mining Company was and now is a corporation created, organized and [3] existing under the laws of the State of Nevada.

IV.

That at all times herein mentioned since on or about September, 1916, the plaintiff has been and now is the owner of Certificate #96, representing 267,000 shares of the capital stock of said Orleans Mining and Milling Company, and is registered as such owner upon the stock-books and records of said corporation; and plaintiff alleges that said 267,000 shares so owned and held by him, or any

part of the same, were not voted directly or indirectly at any stockholders' meeting of said corporation in authorizing or confirming any of the acts or things hereinafter complained of.

V.

That said defendants, J. W. Dunfee, E. Carter Edwards and Charles Ellsworth, comprise a majority of the Board of Directors of said Orleans Mining and Milling Company, and said named defendants also own or control more than a majority of the issued and outstanding stock of said Orleans Mining and Milling Company; that said named persons, directors and stockholders aforesaid knowingly caused and committed the wrongs herein complained of or connived at and approved of the same, and that therefore plaintiff and other stockholders of said Orleans Mining and Milling Company similarly situated have been and are unable to have said wrongs righted or to obtain any redress either by action of the Board of Directors or by appeal to the stockholders of said Orleans Mining and Milling Company, and that for the reasons stated any appeal to said board or to said stockholders for relief in the premises would be wholly unavailing and futile. [4]

VI.

And plaintiff further avers and shows to the Court that on September 2, 1916, for the use and benefit of said Orleans Mining and Milling Company, plaintiff and defendant, J. W. Dunfee, made and entered into an agreement in writing, in the words, form and figures following, to wit:

"Los Angeles, Cal., Sept. 2, 1916.

IT IS HEREBY AGREED by and between J. W. Dunfee of Hornsilver, Nevada, party of the first part, and C. A. Terwilliger of Los Angeles, California, party of the second part, as follows:

In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining & Milling Company, consisting of a lease on the following five claims, namely the Orleans No. 1, No. 2, No. 3, Orleans Extension and Orleans Extension No. 1, together with all other Extensions or purchases thereto belonging, said second party agrees to raise Eight Thousand Dollars ($8,000) as follows, to wit:

Five Thousand Dollars to be raised in sixty days after the books of the Company are ready so that the stock of the Company can be delivered; The remaining Three Thousand Dollars in 120 (one hundred and twenty) days after the books of the company are ready.

It is further agreed by the parties hereto that the first $3000 Three Thousand Dollars is to be paid to said J. W. Dunfee personally, the remaining Five Thousand Dollars is to be used for the development of the property.

It is further agreed that the party of the second part is to advance the necessary money for the organization of the company and this money is to be returned to said second party when the Five Thousand Dollars is raised.

It is also agreed that the money advanced by said first party in working the property from the time work is started until there are funds in the treasury of the company to meet these bills, it to be repaid to said party of the first part when Five Thousand Dollars is raised.

It is further agreed that for every share of his own stock sold by party of the second part in raising Five Thousand Dollars, said party of the first part is to receive five cents per share up to $5000.

It is further agreed that should it be deemed advisable [5] after the full eight thousand dollars is raised to raise more money for development, the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger, respectively.

It is further agreed by the parties hereto, that if either of them desire to sell their stock that it is optional with each party, to each furnish one-half of the stock so sold, and the party selling the stock is to receive 25 per cent commission for such sale.

In case of any controversy arising over this lease or contract, it is hereby agreed that all differences shall be settled by arbitration, each party to this contract picking a man and these two choosing a third, the decision of the three arbitrators being final.

IN WITNESS WHEREOF the parties to this Agreement have hereto set their hands and seals, the day and date first above written.

(Signed) J. W. DUNFEE,
Party of the First Part.
(Signed) C. A. TERWILLIGER,
Party of the Second Part.

Witness:

(Signed) M. G. TERWILLIGER.

that at the time said agreement was made all ground surrounding the mining claims described in said agreement for a distance of 2,000 feet or more was located and held in private ownership by third parties and none thereof was for sale, which condition was a continuing one, all of which was well known to and understood by plaintiff and said defendant, J. W. Dunfee, at the time of making said agreement; that prior to and at the time said agreement was made the defendant, J. W. Dunfee, represented to plaintiff that he, the said Dunfee owned the lease theretofore granted by the Le Champ D'Or French Company, a corporation or company mentioned in paragraph I of said agreement, also that said lease had been granted him by said French company which owned the mining claims mentioned in said agreement, and that he, the said defendant, had had the same or a similar lease from said French [6] company for some years prior, and had mined and taken out from said mining claims about $85,000 gross; also that he, the said Dunfee, was on very close and intimate terms with said French company, and particularly

with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French company, and that because thereof he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that might be desired by plaintiff, the defendant Dunfee, or the corporation to be formed, to wit: the said Orleans Mining and Milling Company. The plaintiff, who then and there and now and at all times herein mentioned had resided in Brawley or in Los Angeles, both in the State of California, was and remained wholly unfamiliar with the subject matter of said lease and of extension or renewal conditions thereof, and wholly trusted and depended upon the said defendant, Dunfee, and believed and relied on his statements that he alone could obtain such extensions or renewals and that he would obtain the same for the use and benefit of said corporation whenever deemed desirable or necessary; that plaintiff and said defendant, Dunfee, had been well acquainted with each other for many years, and said defendant represented and assured plaintiff that because of such acquaintance and friendship, said plaintiff could implicitly trust him, the said defendant Dunfee, as he would never be other than absolutely honorable with an old friend; that said Orleans Development Mining and Milling Company mentioned in said agreement had not then been incorporated, and that said name so used therein referred to a corporation being incorporated as mentioned in the fourth paragraph of said agreement, to wit:

the said Orleans Mining and Milling Company. [7]

VII.

That upon the execution and delivery of said agreement the plaintiff at once entered upon the work and business therein mentioned and advanced the necessary money for the incorporation and organization of the corporation in said agreement contemplated and provided for, to wit, the Orleans Mining and Milling Company, and said company was duly incorporated, and thereupon plaintiff raised and paid in the sum of Eight Thousand ($8,000.00) Dollars as provided for in said contract; and that in consideration of the delivery of the total authorized capital stock, to wit: one million shares of said corporation the said defendant, Dunfee, was to deliver his then existing lease on said mining claims and said contract between plaintiff and defendant of September 2, 1916, above set forth, to said corporation, all of which was duly done; that said leasehold estate so delivered in by said defendant, Dunfee, to said Orleans Mining and Milling Company was and remained its chief and only asset of value; that thereupon and to enable said corporation to further finance itself the said Dunfee, pursuant to an agreement with this plaintiff and in consideration of the premises, delivered into the treasury of said corporation 400,000 shares, and pursuant to said agreement 300,000 of the remaining 600,000 shares were delivered to plaintiff and others associated in interest with him, and the

defendant Dunfee retained the remaining 300,000 shares for his own use and benefit.

VIII.

That thereupon said corporation organized, the defendant Dunfee being elected a director, president, treasurer and general [8] manager, and said corporation commenced the business of mining said leased premises, the said defendant Dunfee having at all times full and exclusive charge, control and management of all and singular said business from thence hitherto; that as plaintiff is informed and believes and so alleges the lease from said French company held by said defendant Dunfee and delivered in as aforesaid to said Orleans Mining and Milling Company expired on or about June, 1917, and pursuant to his said agreement, the said defendant duly procured for the use and benefit of said Orleans Mining and Milling Company, a renewal or extension of said lease until June, 1918, and then obtained in like manner another renewal or extension of said lease until June 1, 1920; that from and according to reports made from time to time by the said defendant, Dunfee, as president and general manager, the said Orleans Mining and Milling Company did not become self-sustaining, though large and valuable bodies and deposits of ore in said leased premises were discovered by means of the moneys paid in by plaintiff as aforesaid, and large and frequent shipments of ore were made from time to time, and in truth and in fact the mine showing continued to improve so

that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant, Dunfee.

IX.

And plaintiff further avers and shows to the Court that said defendant, Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and [9] property, and also to cheat and defraud this plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and appropriate to his own use and benefit the said property, on or about June 1, 1920, when said French company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French company a lease of said mining claims, and on or about December, 1920, the said defendant, Dunfee, pursuant to his corrupt and fraudulent purpose aforesaid, did attempt to wholly exclude said Orleans Mining and Milling Company from ownership or any right or interest in said lease and from the possession of the mining claims therein mentioned by causing said lease so obtained by him to be assigned and delivered to said defendant,

Orleans Hornsilver Mining Company, in consideration as plaintiff is informed and believes and so states that said Orleans Hornsilver Mining Company pay to said defendant, Dunfee, in installments from time to time an aggregate of $50,000 in cash, and 150,000 shares of its capital stock; and that pursuant thereto the said defendant, Dunfee, as president, treasurer and general manager aforesaid of the Orleans Mining and Milling Company, delivered possession to said Hornsilver Mining Company, or permitted it to take possession, of all and singular the property, real and personal, of said Orleans Mining and Milling Company, and then and thereby said Orleans Mining and Milling Company was [10] ejected and ousted from its possession of said property; that prior to said alleged assignment the said Orleans Hornsilver Mining Company as plaintiff is informed and believes and so alleges had full knowledge or notice of all and singular the facts and circumstances above set forth; that neither plaintiff or any other stockholders similarly situated made discovery of the said fraudulent acts and purpose of said defendant, Dunfee, until on or about July, 1921, whereupon plaintiff at once employed counsel to institute appropriate legal proceedings on behalf of said Orleans Mining and Milling Company, but beyond making investigations said counsel did nothing, and on or about March 1, 1922, said counsel advised plaintiff he was unable to proceed further with said matter, whereupon plaintiff employed his present counsel. That plaintiff is ready to do and have equity in the prem-

ises, and that plaintiff has no plain, speedy or adequate remedy at law. That during and while said defendant, Orleans Hornsilver Mining Company, has been in possession of said mining claims, it has mined, broken down, extracted and shipped a large quantity of valuable gold and silver-bearing ore, and has appropriated the proceeds thereof to its own use and benefit, and as plaintiff is informed and believes, said corporation will continue to mine, break down, extract and ship ore from said mining claims unless prevented by restraining order or other injunctive process of this Court; that said premises are valuable only for the gold and silver ores therein contained, and said defendant by mining the ores and appropriating the proceeds thereof is destroying the estate and property of said Orleans Mining and Milling Company therein, and that the damages so caused would be impossible of [11] any reasonably accurate computation.

WHEREFORE, plaintiff prays the decree of this Honorable Court:

(1) That the lease so as aforesaid obtained by the said defendant, J. W. Dunfee, on or about December, 1920, and by him assigned to the defendant, Orleans Hornsilver Mining Company, be decreed to be the sole and exclusive property of the Orleans Mining and Milling Company, and that in respect of all things done by said defendant, Dunfee, in the negotiating for or obtaining said lease, he acted as a trustee and for the use and benefit of said corporation.

(2) That said defendant, Orleans Hornsilver Mining Company, be decreed to have no right, title or interest in or to said property, lease or leasehold estate, or to the possession of the said property, or the mines, mining claims so leased, and that it be decreed that said corporation forthwith surrender and yield possession of said property to the Orleans Mining and Milling Company, and said Orleans Hornsilver Mining Company be required to account for any and all ores mined, extracted or shipped from said premises by it during and while it has been in possession of said property; that said Orleans Hornsilver Mining Company pending trial herein be restrained and enjoined from further working or mining in or upon said mining claims or shipping any ore therefrom, and that by final decree herein it be perpetually enjoined from having, claiming or asserting any right, title, interest, estate or possession in or to said property or the leased mining claims or any part thereof.

(3) That plaintiff recover from the defendants, J. W. Dunfee [12] and Orleans Hornsilver Mining Company, his costs and disbursements incurred herein, and

(4) That plaintiff have such other and further relief as the equities of the case may warrant and which to the Court shall seem meet and proper.

COOKE, FRENCH & STODDARD,
Attorneys for Plaintiff.

State of California,
County of Los Angeles,—ss.

C. A. Terwilliger, being first duly sworn, says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint, and knows the contents thereof and that the same is true of his own knowledge, except as to the matters therein stated upon his information and belief, and as to those matters, he believes it to be true.

C. A. TERWILLIGER.

Subscribed and sworn to before me this 24th day of March, 1922.

[Seal] GEORGE H. SCHNEIDER,
Notary Public.

My commission expires Sept. 1, 1925.

[Endorsed]: Filed this 3d day of April, 1922. [13]

[Title of Court and Cause.]

SEPARATE ANSWER OF DEFENDANT DUNFEE.

Answering the bill of complaint of plaintiff on file herein, defendant J. W. Dunfee admits, avers and denies as follows:

I.

Answering paragraph I defendant avers that in addition to the parties named in said paragraph as the directors of the Orleans Mining & Milling

Company, hereinafter called the Orleans Company, one Celora M. Stoddard is, and since the 14th day of August, 1917, has been, a director of said company; that said Stoddard is, and at and before the time of the commencement of this action was, a citizen and resident of the City of Phoenix, State of Arizona, and is a necessary party to this action. Denies that the Orleans Company owns, or since the 30th day of May, 1919, has owned, real or personal or any property or mining or any rights or right in Hornsilver Mining District or anywhere. Avers that on the 19th day of June, 1915, and thence until the 30th day of May, 1919, the Orleans Company by itself and this defendant owned a lease on the mining claims named in said complaint; that it acquired said lease by assignment from this defendant in pursuance of the terms of the written [14] agreement set forth in said complaint; that said lease contained, among others, the following terms: "That the said lessee shall work at least sixty shifts of one man during each and every month continuously during the life time of this lease," and "that should the lessee fail to work at least sixty shifts of one man during any month, this lease would terminate at the end of the following month."

II.

Answering paragraph IV, defendant avers that he has no information or belief as to whether or not plaintiff was, at the time of the commencement of this suit, or since has been, or is, the owner of certificate #96 or any certificate representing 267,000 or any

shares of the capital stock of the Orleans Company, and placing his denial on that ground denies that plaintiff was at said time, since has been, or is the owner of said or any certificate or shares or share of said company. Denies that said 267,000 shares were not voted directly or indirectly in authorizing or confirming any of the acts or things mentioned in said complaint; avers that said shares were, at the time in this paragraph mentioned, the balance of an original total of 300,000 shares issued to plaintiff in pursuance of the terms of the said written agreement; that 33,000 thereof were thereafter, and before the times in this paragraph mentioned, disposed of by plaintiff to certain parties; that such parties are the other alleged stockholders for whose benefit, in addition to his own, plaintiff purports to be prosecuting this suit and are the identical parties referred to in said complaint as plaintiff's associates; that on and prior to in said complaint as plaintiff's associates; that on and prior to the 30th day of September, 1918, plaintiff and said [15] associates served and caused to be served upon this defendant and through this defendant upon the Orleans Company a demand in writing of which the following is a copy, to wit:

Brawley, Cal., Sep. 30, 1918.

Mr. J. W. Dunfee,

Hornsilver, Nevada.

Friend Will: Your letter of the 14th received and contents carefully noted. Now would say in regard to this mine, it is my opinion and all of the stockholders here, that under the present war con-

ditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running and we are not in favor of your putting up your money in running the property and placing the company under obligations and being indebted to you. Now, we have given this proposition a fair trial and after we have moved $60,000 or $75,000 worth of ore and with no results to yourself or anyone else (except to the mill people) and also in view of the fact that we have done a very large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment—besides the experience.

Also whether the mill closes down or not, it is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any more ore or money. We have been faithful and honest and put up our money when it was needed and we are going from now on to have something to say about it. . . .

Now regarding the legality of Mr. Curn who insists on the return of his investment. This is a small matter, and the only way to keep the company out of trouble is to pay it. I have the law on this matter and know it is legal, and it will make a lot of talk and trouble if he takes legal action on it, which he will certainly do if the company don't pay it. His name is Velvin Curn, and you can make the check out to him and mail it to me and I will

at once secure his stock properly indorsed and mail to you for cancellation.

We must remember that four of our stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French Company are in duty bound to protect them and to see that their investment, which they have entrusted to us, is absolutely bona fide. Now let me hear from you as soon as possible. Kind regards to yourself and Judge. I remain,

Yours very truly,

C. A. TERWILLIGER.

That thereafter this defendant, pursuant to said demand, and as president and general manager of the Orleans Company, [16] discontinued all work, and on the 6th day of November, 1918, notified plaintiff and his said associates in writing that all work had been discontinued, under said lease. That on the 11th day of November, 1918, defendants Dunfee, Ellsworth and Edwards convened as the board of directors of said company; that this defendant submitted said demand and his action thereon to said board and said board then and there adopted the following resolution, to wit:

> It appearing to the satisfaction of the Board that the Company was without funds, it was duly moved and seconded that said statement be accepted and the lease be closed down according to the request of Terwilliger in said letter contained.

III.

Answering paragraph V, this defendant denies

that defendants or any of them as directors or stockholders or director or stockholder or otherwise knowingly or at all caused or committed, connived at or approved, the alleged wrongs complained of or any wrongs or wrong, or that plaintiff or any stockholders or stockholder similarly or otherwise situated have been or were or are or is unable to have said alleged or any wrongs or wrong righted or to obtain any and all redress by action of said board of directors or by appeal to the stockholders of the Orleans Company or by any appropriate means. Avers that plaintiff and his said associates have never, nor has any of them ever, by request, demand or otherwise, sought to have any alleged wrong redressed by or through said board of stockholders, or been by any act or omission of defendants or any of them prevented or hindered therefrom. [17]

IV.

Answering paragraph VI defendant avers that he has no information or belief as to whether or not, at the time that the agreement set forth in said complaint was made, all ground surrounding the mining claims described in said complaint for a distance of 2,000 feet or more or any distance was located and held in private ownership by third parties and none thereof was for sale, which condition was a continuing one, all of which was known to and understood by plaintiff, and putting his denial on that ground denies the same; denies that said condition was known or understood by this defendant; denies that plaintiff was or remained wholly

unfamiliar with the subject matter of said lease or wholly or at all unfamiliar with extension or renewal conditions thereof, or wholly trusted or depended upon this defendant or believed or relied on his statements that he alone could obtain such extensions or renewals or that he would obtain the same for the use and benefit of said company whenever deemed desirable or necessary; denies that defendant stated to plaintiff or at all, or that it is a fact, or that plaintiff believed, that this defendant alone could obtain such extensions or any extensions, or would obtain them, or might obtain them save in the event that the lessee performed all of the terms of said lease on his or its part to be kept and performed; avers that two extensions of said lease were personally applied for and obtained by plaintiff alone. Denies that this defendant represented to or assured plaintiff, because of long acquaintance or friendship or otherwise, or that this defendant represented to or assured plaintiff at all, that plaintiff could implicitly or otherwise trust this defendant, or represented to [18] or assured plaintiff that this defendant would never be other than absolutely honorable with an old friend; denies that plaintiff relied upon said alleged or any representation, or anything except said written contract until said corporation was formed; denies that plaintiff relied upon said or any representations or on said contract after said corporation was formed; denies that this defendant was ever other than absolutely honorable and trustworthy with plaintiff or than as an old friend. Avers that said written

agreement was by the parties thereto intended to merge and supersede all of the word-of-mouth negotiations preceding the making thereof.

V.

Answering paragraph VII this defendant denies that any of said 600,000 shares were by this defendant or the Orleans Company delivered to persons associated with plaintiff, but avers that plaintiff sold part of the 300,000 shares allotted to plaintiff to persons associated with him.

VI.

Answering paragraph VIII this defendant denies that he had at all or any times or time full or exclusive charge, control or management of all or singular or any of said business from thence hitherto or at all; avers that he acted as director, president, treasurer and general manager subject to the articles of incorporation, by-laws and the resolutions of the board of directors of said company and not otherwise. Denies that he acted for said company in any capacity or at all after May 30, 1919. Avers that on and after said date said company was without assets or business and was to all intents and purposes dead. Denies that the mine showing [19] continued to improve or improve at all after the service by plaintiff upon defendant of the letter demand hereinbefore set forth or until April, 1921, as hereinafter set forth. Denies that from or according to report or reports issued by this defendant or anybody, or in fact, large or valuable bodies or body or deposits or deposit of or any ore were or was discovered after

said demand by means of the money paid in by plaintiff or anybody or at all except as aforesaid; denies that plaintiff or anybody paid in any money, or that from or according to such reports or report, or in fact, large or frequent shipments or shipment or any shipment were or was made from time to time or at all until in and after July, 1921, or that from or according to such reports or report, or in fact, the prospect for a large or paying mine, or any prospect, was in March, 1920, or ever after the receipt of said demand, or until over a year after the expiration of said lease, more favorable or any different. That when said demand was received by this defendant and acted upon by the Orleans Company as aforesaid the mine showing was, and this defendant, on the 6th day of November, 1918, notified plaintiff and his said associates that it was as follows: None of the ore then in sight could be worked at a profit; all other ore had been pretty well worked out, and the success of the mine in the future required proper development to disclose the ore bodies that diligence and perseverance would no doubt disclose. That the Orleans Company never, after the receipt of said demand, performed any work under said lease or at all and has never thence hitherto had any funds or means whatever. That said demand has never by plaintiff or any of his said associates been withdrawn. That said resolution acting on [20] the same has never been repealed or rescinded; that no meeting of the board of directors or of the stockholders of the Orleans Company has been held since 11th day

of November, 1918, or been demanded or requested by plaintiff or any of said associates or any attempt made by plaintiff or said associates to finance said company or resume work under said lease or at all. That within thirty days after the receipt of said demand and action taken thereon by said board the local custom mill at Hornsilver, on which the Orleans Company relied for the treatment of its ore, went out of business and began to dismantle its plant. That this defendant, by letter dated January 31, 1919, notified plaintiff of the closing of said mill, called plaintiff's attention to the above-mentioned report covering mine conditions, told plaintiff that as plaintiff had ordered the mine shut down it was up to plaintiff to start it, and asked plaintiff to make suggestions touching the future financing of the company. That plaintiff ignored said letter. That on the 30th day of May, 1919, said lease was by the lessor revoked and cancelled for failure on the part of the Orleans Company to perform the required amount of work, and was never thereafter renewed.

VII.

Answering paragraph IX this defendant denies that in March, 1920, or ever he conceived or had the intent or purpose to, or that he did, cheat or defraud the Orleans Company out of its said alleged or any leasehold estate or property or anything, or cheat or defraud plaintiff or others or other stockholders or stockholder similarly or otherwise situated or at all out of the value of their stock in said corporation or anything; denies that in

March, [21] 1920, or at any time since May 30, 1919, said stock was or that it is of any value; denies that he obtained a lease from said French Company with the fraudulent or any intent or purpose to, or that he did thereby or at all, obtain or appropriate to his own use anything owned by or of value to the Orleans Company or plaintiff or his said associates or said stockholders or stockholder, or to which they or any of them were or was or are or is entitled, or that he secretly negotiated for or obtained the same, or as director, president, treasurer, general manager or other officer or trustee of the Orleans Company or in exclusive or any charge of its business or operations or operation, or pursuant to any corrupt or fraudulent purpose, or that he had exclusive or any charge of its business or operations or operation or had any such purpose; denies that he attempted wholly or at all to exclude said company from any ownership or any right or interest in said lease or possession, or that it had any, or by causing said lease to be assigned or delivered to defendant Orleans Hornsilver Mining Company, hereinafter called the Hornsilver Company, or as president, treasurer, general manager or other officer or agent of the Orleans Company, or that he delivered possession to said Hornsilver Company, or permitted it to take possession, of any property, real or personal, of the Orleans Company, or that then or thereby said Orleans Company was ejected or ousted from any property or possession or at all. Denies that the consideration for said assignment was or is the sum of

$50,000 or any sum of money in excess of $40,000. Denies on information and belief that said Hornsilver Company had full or any knowledge or notice of all or singular the said alleged facts or fact, circumstances or circumstance. Avers that as to when plaintiff or any other stockholders or [22] stockholder similarly or otherwise situated made discovery of said alleged facts or circumstances this defendant has no knowledge or information upon which to base a belief, and he therefore denies that plaintiff and said stockholders had no such notice or knowledge until in or about July, 1921. Avers that in April, 1919, this defendant, by letter of said date, notified plaintiff that said lease would expire by its own terms on May 31, 1919, and that said lessor company did not purpose renewing the same unless work was resumed thereon. Avers that the said lease and the fact of the cancellation thereof have been, since May 30, 1919, of record in the office of the Orleans Company in Goldfield, Nevada, in the possession of defendant Edwards as secretary of said company, and that neither plaintiff nor any of said stockholders applied at said office or to said secretary or to this defendant for any information concerning the same. As to whether plaintiff at once or ever employed counsel to institute appropriate or any legal proceedings or proceeding on behalf of the Orleans Company this defendant has not sufficient knowledge or information upon which to base a belief, and therefore and on that ground denies that counsel was employed for said purpose.

Denies that plaintiff is ready or is able to do equity in the premises.

VIII.

Further answering paragraph IX defendant avers that for over a year after the cancellation of said lease this defendant devoted his exclusive attention to other enterprises in places other than Hornsilver and that during said time said leased property remained wholly idle and in the possession and under the control of the lessor company. That in February, 1920, plaintiff Terwilliger wrote [23] this defendant asking about said leased property. That in March, 1920, this defendant wrote plaintiff that, after traveling over the state, he, this defendant, believed said property was the best property in the state and that if plaintiff would come to Goldfield, Nevada, and see defendant Edwards as the attorney-in-fact of the lessor company, and would put up some money for operations, he, this defendant, and plaintiff could obtain a new lease. That on May 2, 1920, plaintiff replied to said letter as follows, to wit:

4419 Finley Ave., Los Angeles, Cal.
May 2, 1920.

J. W. Dunfee,
Goldfield, Nev.

Friend Will:

Your letter of some time ago received and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the

mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,
C. A. TERWILLIGER.

That neither this defendant nor the Orleans Company ever thereafter heard from or of plaintiff or any of his said associates until after the consummation of the deal sought to be set aside in this action. That in June, 1920, this defendant resumed prospecting operations on said property on his own behalf under a written lease between said lessor company and this defendant and performed work thereunder in June, July and August, 1920, amounting to 54 shifts, wholly at his own risk and expense. That prior thereto parts of the hoist, the gas-tank, and all movable mining and blacksmith tools had been stolen; that this defendant replaced the same at a costs to him of $1,000. That this defendant then tried to interest [24] one A. I. D'Arcy, afterwards promoter of the Hornsilver Company, in said lease, and offered the same to him for $6,000. That said D'Arcy, after a careful expert examination of said property, declined to consider said or any offer. That this defendant then, at his own expense, in about August, 1920, performed about 52 additional shifts of work on said property. That this defendant spent the month of September, 1920, in Los Angeles, California, trying to finance said lease; that he wholly failed so to do, and in October, 1920, returned to Goldfield and surrendered said lease to said lessor company for cancellation and

the same was cancelled then and there. That late in December, 1920, defendant Edwards, as attorney-in-fact for said lessor company, persuaded this defendant to resume operations on said property, and this defendant resumed operations thereon under an unwritten understanding with defendant Edwards as such attorney-in-fact that he, this defendant, could have a lease and bond on said property if he wanted it. That thereafter in said month defendant procured one Gordon Bettles to take an option on this defendant's said prospective leasehold and bond rights for $2,000 cash and 20 per cent of production. That this defendant was then $2,000 in debt incurred in trying to open up and finance said property and was without means. That said Bettles, after an examination of said property, failed to exercise said option. That in said month this defendant borrowed $75 with which to resume operations on said property and resumed operations thereon. That in January, 1921, this defendant procured one William Sirbeck to take a 14-day and later a 30-day option on said prospective leasehold and bond rights at $2,500. That said Sirbeck, after examining said property, failed to exercise said option. That [25] while said options were pending this defendant continued work on said property at his own expense. That in March or April, 1921, this defendant procured the Tonopah Mining Company to take a 30-day option at $20,000 and 20% of production; that said Tonopah Mining Company put a crew of men to work exploring and sampling said property. That this defendant there-

upon demanded the written lease and bond promised him by defendant Edwards as attorney-in-fact and the same was given him and dated back to January 1, 1921, to cover the time that this defendant had been operating under said unwritten understanding. That said lease and bond is the lease and bond involved in this action. That said Tonopah Mining Company continued its prospecting work on said premises for five weeks and then declined to exercise said option. That this defendant in May, 1921, again tried to interest said D'Arcy but was unable to do so principally because of the refusal of said Tonopah Mining Company to exercise its said option. That this defendant continued to operate said property at his own expense, working alone on the 600-foot level, performing about 70 feet of lateral work and 24 feet of raise, in the course of which this defendant discovered 4 feet of ore assaying $60 and breaking down at $34 per ton. That by means of said discovery this defendant induced said D'Arcy to enter into the transaction involved in this action. That after said discovery and pending negotiations with said D'Arcy this defendant shipped several carloads of ore the proceeds of which netted him about $5,000. That after realizing said sum this defendant was still out-of-pocket about $1,000 on account of his outlays in opening up and marketing said property, [26] exclusive of the value of his own time and labor. That neither plaintiff nor any of said other stockholders made any claim, for themselves or on behalf of the Orleans Company, to any right or interest

in said property or any lease thereon after May 30, 1919, or until the 2d day of August, 1921, after said deal was made with said D'Arcy, and never contributed or offered to contribute toward this defendant's work and expenses done, incurred and laid out after May 30, 1919. Denies that the Jan. 1, 1921, lease was a modification, extension or renewal.

IX.

Avers that by reason of the premises this action is barred by the gross laches and negligence practiced and suffered by plaintiff and said other alleged stockholders.

WHEREFORE, This defendant prays that plaintiff's prayer be wholly denied and that this defendant have judgment for his costs, and general relief.

AUGUSTUS TILDEN,
Attorney for Defendant Dunfee.

State of Nevada,
County of Washoe,—ss.

J. W. Dunfee, being first duly sworn, deposes and says: That he is the defendant above named; that he has read the above and foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to the matters which are therein stated or denied on information and belief or want of information or belief, and as to those matters that he believes it to be true.

J. W. DUNFEE.

Subscribed and sworn to before me this 25th day of May, 1922.

[Seal] WM. McKNIGHT,
Notary Public. [27]

[Endorsed]: Filed May 26, 1922.

Receipt of a copy of the within answer of J. W. Dunfee this 25th day of May, 1922, is hereby admitted, and said defendant's time to file same is hereby extended three days.

COOKE, FRENCH & STODDARD,
Attorneys for Plaintiff. [28]

[Title of Court and Cause.]

DECISION.

(Appearances.)

There was a written agreement between defendant Dunfee and the plaintiff Terwilliger, providing for the operation of certain mining claims in Hornsilver Mining District, Esmeralda County, Nevada. The property belonged to a French company, for which defendant Edwards was the local agent and attorney-in-fact. At the time the agreement was executed, September 2, 1916, Dunfee held a lease on the premises effective until May 31, 1917. He represented to Terwilliger that he was on such intimate terms with Edwards that he could procure in his own name renewals and extensions of the lease when he desired. The agreement provided that Dunfee should give Terwilliger a 50% interest in the lease, and on his part, Terwilliger was to raise

$8,000; $3,000 of which was to be paid to Dunfee, and the remaining $5,000 to be used for development of the property. It was also stipulated that Terwilliger should advance necessary funds to organize a corporation to take over and operate the leased property. It was further stipulated that the money so advanced should be returned to him when the $5,000 was raised. There was a further provision that if in the future it became advisable to sell stock to raise more money for development purposes, the stock so disposed of should be taken share for share from the holdings of Terwilliger and Dunfee respectively; and that if either desired to sell his [29] stock it should be optional with the other to furnish one-half of the stock so sold. Accordingly the defendant Orleans Mining and Milling Company was organized, with a capital stock divided into one million shares having a par value of one dollar each. The lease was turned over to the company, and in consideration all the stock was issued to Dunfee; 300,000 shares he retained for himself, giving an equal amount to Terwilliger, and depositing 399,000 shares in the treasury of the company; 1,000 were issued to the defendant Edwards. Dunfee, Terwilliger and Edwards became and were directors of the corporation; Dunfee was president, general manager and treasurer; Terwilliger, vice-president and secretary. In order to raise the $8,000, Terwilliger sold 33,000 shares of his own stock to various persons, most of whom resided in Imperial Valley, California. Prior to the agreement the mines had produced about $85,000, and

thereafter under the Orleans Mining and Milling Company, prior to November 8, 1918, during a period of two years and two months, the gross yield was $65,000. About this last date, by consent of all parties, operations on the property ceased. It was the unanimous opinion that under prevailing war prices and conditions, work could not be continued at a profit. The original lease was from year to year, and required 60 shifts of work per month. In 1919 it was renewed for another year, and expired June 1, 1920. On the 5th day of the same month a new lease on somewhat different terms was taken by Dunfee in his own name. This he held until October of the same year, when he surrendered it after doing some 137 feet of work. Later, about January 1, 1921, he took another lease, also in his own name, and again worked in the mine. July 18, 1921, he sold his lease for $40,000 and 150,000 shares of stock of the Orleans Hornsilver Mining Company.

The correspondence in relation to shutting down the [30] mine and the attendant circumstances, indicate that it was intended, not as an abandonment, but only as a temporary suspension of operation until mining conditions improved. As to the requirement of 60 shifts of work per month under the lease, the testimony of Mrs. Terwilliger is that Edwards agreed with the plaintiff Terwilliger in her presence that excess work done on the property up to the time of the shut-down should apply on future work required under the lease. September 30, 1918, writing to Dunfee, Terwilliger says:

"It is my opinion and all of the stockholders here that under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running. . . . In view of the fact that we have done a very large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment. . . . We must remember that four of the stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French company are in duty bound to protect them and see that their investment, which they have entrusted to us, is absolutely *bona fide.*"

The mine was self-sustaining. When operations were suspended the company was free from debt. Furthermore, there is no evidence that any money, other then that raised by Terwilliger in addition to the earnings of the mine itself, was necessary to pay expenses.

In the report issued to the stockholders August 1, 1918, by Dunfee, Terwilliger and Edwards, they said:

"The present prospects of the mine are good, as on the 600-foot level after encountering some bad luck on the 400 and 500 foot levels in finding a leached-out condition and ore of [31] so low grade as hardly to bear treatment under present conditions, we have

uncovered a fine body of ore, running from $45 to $50 per ton in the better class of it, with a large amount of ore of $15 to $25 per ton.

"The owning company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done.

"The company has also kept in mind the development of the property, and the ore mined has been milled at the nearby mill at Hornsilver, and the proceeds used in development work and payment of bills, and the deeper developments have been very encouraging as above stated.

"The company has also an option to purchase the property leased from the owning company, which can be exercised at any time we deem it practicable."

In the report as president and general manager, dated November 6, 1918, Dunfee says:

"The conditions have been so unfavorable, owing to the war, high prices, and inefficiency of labor, that it has been deemed best to close down the mine. The mine is entirely free from debt, and no trouble can come from creditors, as there are none. As to the future of the mine, will make the following recommendations:

"Extend the east drift on the 600-ft. level to the east. On the drift on this level we have been in a big body of low grade quartz for the last 150 feet, with a small rich seam laying

in the quartz. At time of closing down mine, have not encountered pay ore shoot in the drift to the east as we had expected from the rake of the shoot from the upper levels. Indications are good for the shoot still to come in. To the west drifted 65 ft. on the 600 level. From a winze at this point I took last shipments and found some very rich ore at bottom of winze. Owing [32] to high cost of mining, etc., could not underhand-stope this ore out at a profit."

March 26, 1920, in a letter to Terwilliger, Dunfee says he had looked the state over, and there was a better chance on the Orleans than anything he had seen.

It is impossible to find there was on the part of Terwilliger, or any of the stockholders, any intention to abandon the enterprise. Until July, 1921, Terwilliger knew nothing of the sale, or that Dunfee claimed to be sole owner of the lease. No notice of such was ever, prior to that date, given by Dunfee or Edwards to Terwilliger. Dunfee's mining appears to have been on the six or seven hundred foot level of the mine, and was not of a character to attract attention. Taking the lease in his own name was not unusual, as previous leases, extensions and renewals had been to Dunfee and in his name. In this respect those subsequent to June 1, 1920, did not differ from previous leases, and were insufficient to inform plaintiffs that Dunfee was holding or claiming adversely. In July, 1921, Terwilliger employed an attorney who withdrew in

the following March. The complaint was filed April 3, 1922.

The prayer of the complaint is (1) that the lease be decreed to be the sole property of the Orleans Mining and Milling Company, and that in obtaining it Dunfee acted in all things as trustee for the use and benefit of said company; (2) that the Orleans Hornsilver *Ming* Company be decreed to have no interest in the leasehold estate, and that it be required to surrender possession to the Orleans Mining and Milling Company, and to account for any and all ores by it mined and extracted while it was in possession; (3) that plaintiff recover its costs from Dunfee and the Orleans Hornsilver Mining Company; and (4) that plaintiff have such further relief as to the Court may seem proper.

Before the trial the cause was dismissed as to the defendant [33] Orleans Hornsilver Mining Company, whereupon Dunfee moved that the case be dismissed as to him also. The theory was that inasmuch as plaintiff had in his bill disavowed the sale and demanded surrender of the property sold, he had made an election which precluded further proceedings in which he might affirm the sale and demand the proceeds received by Dunfee. The motion was overruled.

When Terwilliger discovered that Dunfee, claiming to be the sole owner of the lease, had sold it to the Orleans Hornsilver Mining Company, two remedies were available; he could claim the sale was infected with fraud in which the purchaser par-

ticipated, or of which it had notice, and ask that the sale be set aside and the property surrendered to the Orleans Mining and Milling Company; or he could affirm the sale and demand the proceeds. True, the remedies would be inconsistent, but in Equity Rule 25 it is expressly declared that in the prayer, relief may be sought and stated in alternative form. Alternative means "mutually exclusive." (Cent. Dic.; Boyd vs. New York & H. R. Co., 220 Fed. 174, 179.) The prayer in equity usually is an expression of plaintiff's opinion as to the specific assistance to which he is entitled; but he may be mistaken, hence it has been the practice of cautious pleaders to ask also for general relief. The alternative forms of relief may be contradictory, but that circumstance is not fatal, provided the alternative relief is consistent with the facts alleged in the bill.

In the complaint there is no specific alternative prayer that Dunfee be adjudged to be a trustee as to the consideration received by him for the assignment of the lease, and that he surrender the same to the Orleans Mining and Milling Company; but the facts alleged, if true, are sufficient to support such a decree; and this is so without adding to or subtracting from anything in the bill. It would also be true whether the Orleans Hornsilver Mining Company was an innocent [34] purchaser or not. In the prayer this alternative is demanded, if at all, in the request for general relief. In either respect, the case is based on the alleged trust relationship of Dunfee to the Orleans

Mining and Milling Company, and his fraudulent sale to the Orleans Hornsilver Mining Company. There is no claim that he was taken by surprise when as to the last-mentioned corporation the case was dismissed, or that in consequence he changed his position to his detriment. The wrong done and the cause of action remain the same, notwithstanding the dismissal of the Hornsilver Mining Company. Dunfee is still a necessary and a proper party. By placing the property in the hands of an innocent purchaser, he put it beyond the reach of the Court, and consequently the prayer that it be restored is of no avail. But it does not follow that the plaintiff must be denied the alternative relief to which he is obviously and justly entitled, because instead of praying specifically for the proceeds of the sale, he has asked such other and further relief as the equities of the case may warrant, and which to the Court shall seem just and proper.

"There is nothing," says Justice Peckham in Lockhart vs. Leeds, 195 U. S. 427, 436, "in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which *which* is advanced under one of the special prayers."

In United States vs. Frick, 244 Fed. 574, af-

firmed in 255 Fed. 612, the prayer was that a patent obtained by fraud be set aside, the land restored to the public domain, and also that the plaintiff have such relief as may accord with the [35] principles of equity. Frick, by whose fraudulent practice the patent had been obtained, purchased from the patentee, and thereafter sold to a *bona fide* purchaser for value. The sale was made, the deed recorded, and the transaction called to the attention of the complainant before its bill was filed; nevertheless it was held that under the general prayer for relief the value of the land could be recovered.

Similar cases are Cooper vs. United States, 220 Fed. 867, and United States vs. Debell, 227 Fed. 760.

Dunfee's claim that the case against him should be dismissed because plaintiff had elected to pursue a different and an inconsistent relief, is without merit.

During the entire period from the organization of the Orleans Mining and Milling Company to and including the date the lease was sold, Dunfee was the president, treasurer, and general manager of the corporation; he and Edwards were two of its three directors, and they held more than half of the issued capital stock. While Dunfee was so acting for the company he discovered the ore mentioned in his report of August, 1918, and he also learned where more could probably be found. About $5,000 above the earnings of the mine had been expended in so doing, and this money had

been procured from persons to whom Terwilliger had sold stock of the company. Dunfee had himself received $3,000 from the same source; he was occupying a confidential and a fiduciary relation to the Orleans Mining and Milling Company and its stockholders, and must be held, under all the authorities, to the utmost good faith in dealing with them. Terwilliger and the other stockholders hoped and expected that a renewal of the lease would be obtained for their company; they were amply justified in believing and relying on Dunfee's assurance that he could and would procure further extensions. This hope or expectance of renewals, under all the [36] authorities, and as against Dunfee and in favor of Terwilliger and the Orleans Mining and Milling Company, was a valuable property right, and this was true even though there was no enforceable right to a renewal of the lease.

Robinson vs. Jewett, 116 N. Y. 40, 22 N. E. 224–6–7.

McCourt vs. Ginger-Beggers, 145 Fed. 103, 108.

Johnson's Appeal, 2 Am. St. Rep. 539.

Davis vs. Hamlin, 48 Am. Rep. 541, 544.

3 Pom Eq. Jurisp., sec. 1050.

In Mitchell vs. Reed, 119 Am. St. Rep. 252, 65 N. Y. 123, a partnership, formed to continue until a certain date, leased premises to expire at the same date, and made valuable improvements thereon; during the term one partner, without the knowledge of the other, took a renewal of the lease

in his own name for a term to begin at the expiration of the partnership term. It was held that the new lease inured to the benefit of the firm, and the partner was in equity a trustee of the lease for the partnership.

In Largarbe vs. Anniston Lime & Stone Co., 28 So. 199, the defendants, who were respectively president and secretary of the corporation, knowing that the corporation had a lease on certain land and contract for the purchase, bought the land for their own use. It was held that this was a breach of the trust arising out of their fiduciary relations, and that they were trustees of the property for the benefit of the corporation.

See, also, the Pike's Peak Co. vs. Pfunter, 123 N. W. 19, and cases cited above.

The evidence in the present case clearly shows that the lease was acquired by Dunfee in violation of his duty to the corporation, and without the knowledge or consent of the Orleans Mining and Milling Company for whom he was acting; hence he must be held as a trustee, and as such it is found that he [37] holds the 150,000 shares of stock and the $40,000 in money received by him from the sale of the lease in question, in trust for the plaintiffs.

Let a decree be entered in accordance with the foregoing opinion.

[Endorsed]: Filed October 7th, 1925. [38]

In the District Court of the United States in and for the District of Nevada.

IN EQUITY—No. B-39.

C. A. TERWILLIGER, on Behalf of Himself and All Other Stockholders of the ORLEANS MINING AND MILLING COMPANY, a Corporation, Similarly Situated,

Plaintiffs,

vs.

J. W. DUNFEE, ORLEANS MINING AND MILLING COMPANY, a Corporation, J. W. DUNFEE, E. CARTER EDWARDS and CHARLES ELLSWORTH, Directors of Said Corporation, and ORLEANS HORNSILVER MINING COMPANY, a Corporation,

Defendants.

JUDGMENT AND DECREE.

This cause came on to be heard on December 1, 1922, and thereafter was argued by counsel and submitted to the Court, and thereupon and upon consideration thereof the Court made and filed its written decision and opinion herein, and thereafter the Court made and filed its findings of fact and conclusions of law herein and ordered that a decree in accordance therewith be entered herein.

IT APPEARING TO THE COURT that the defendant J. W. Dunfee received one hundred and fifty thousand shares of the capital stock of the Orleans Hornsilver Mining Company, a corpora-

tion, and Forty Thousand Dollars in money, all of which shares of stock and money was received by said defendant J. W. Dunfee as trustee for the use and benefit of plaintiffs, and that said one hundred and [39] fifty thousand shares of stock and said Forty Thousand Dollars was and is the property of and belongs to said plaintiffs.

NOW, THEREFORE, it is ORDERED, ADJUDGED and DECREED that said defendant J. W. Dunfee pay and deliver over to the plaintiffs above named the said sum of Forty Thousand Dollars, and it is—

FURTHER ORDERED, ADJUDGED and DECREED that on or before December 10th, 1925, the said defendant J. W. Dunfee deliver to plaintiffs the said one hundred and fifty thousand shares of the capital stock of said Orleans Hornsilver Mining Company, and it is—

FURTHER ORDERED and ADJUDGED that plaintiffs have judgment against the said defendants J. W. Dunfee and E. Carter Edwards, and each of them, jointly and severally for plaintiffs' costs and disbursements of this suit, taxed at the sum of $84.40.

Done in open court this 16th day of November, 1925.

E. S. FARRINGTON,
District Judge.

Service of the within by copy admitted November 7, 1925.

AUGUSTUS TILDEN,
Attorney for Deft. J. W. Dunfee.

[Endorsed]: Filed this 16th day of November, 1925. [40]

[Title of Court and Cause.]

PETITION FOR APPEAL AND ORDER GRANTING SAME.

Filed ———, A. D. 1926, in the District Court of the United States for the District of Nevada.

To the Hon. E. S. FARRINGTON, District Judge, etc.:

The above-named defendant, J. W. Dunfee, feeling himself aggrieved by the decree made and entered in this cause on the 16th day of November, 1925, does hereby appeal from said decree to the Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at San Francisco, California.

And your petitioner further prays that the proper order touching the security to be required of him to perfect his appeal be made.

AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Petitioner.

ORDER.

The above petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of One Thousand Dollars.

E. S. FARRINGTON,
Judge of the United States District Court, District of Nevada. [41]

[Endorsed]: Filed May 7, 1926, 3:35 P. M.

Receipt of a copy of the within this 7th day of May, 1926, is hereby admitted, reserving all valid objections.

COOK & STODDARD,
Attorneys for Plff. [42]

[Title of Court and Cause.]

SPECIFICATION OF ERRORS.

Comes now defendant J. W. Dunfee, by his attorneys, Augustus Tilden and J. F. Kunz, and in connection with his petition for allowance of appeal herein, says that the decree entered in the above-entitled cause on the 16th day of November, 1925, is erroneous and unjust to said defendant for the reasons following, to wit:

1. Said decree is erroneous and contrary to the pleadings in this, that plaintiff's complaint sets forth facts which, if true, entitle him, if anything, to a decree adjudging, and plaintiff in the prayer of his complaint specifically prays judgment, that the Orleans Mining & Milling Co. is the owner and

entitled to the possession of a certain mining lease dated June 5, 1920, and the leased premises, and a certain "modification, renewal and extension" thereof dated January 1, 1921, whereas by its said decree the Court adjudged that certain 150,000 shares of stock and $40,000.00 in money were received by defendant Dunfee as trustee for plaintiff and that he deliver and pay the same to plaintiffs. [43]

2. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this, that the complaint charges that defendant Dunfee sold said lease to the Orleans Hornsilver Mining Co. upon the agreement of the latter to "pay to said defendant Dunfee, in installments from time to time an aggregate of $5,000.00 in cash and 150,000 shares of its capital stock"; the evidence shows without conflict that said money consideration was $40,000.00 payable in installments, of which but $20,000.00 had been paid; nevertheless the said decree adjudges that defendant Dunfee pay and deliver over to plaintiff $40,000.00 without deduction.

3. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this: that it adjudges that defendant Dunfee received said stock and money as the purchase price for a lease in which the Orleans Mining & Milling Co. was interested as lessee, whereas the evidence shows without conflict that the only lease in which said company was interested, to wit: the lease of June 19, 1915, expired by its own terms on May 31, 1920, and was moreover expressly cancelled by the lessor

on May 30, 1920, for the total failure of the lessee for over nineteen months to perform any condition thereof.

4. Said decree is erroneous, unsupported by the pleadings, and contrary to equity and the evidence, in this: that it adjudges that defendant Dunfee, as an officer of the Orleans Mining & Milling Co., received said stock and money as the purchase price of a lease in which said company was interested, whereas the evidence shows without conflict that after the lease owned by said company expired by forfeiture on May 30, 1920, and by lapse of time on May 31, 1920, defendant Dunfee, on June 5, 1920, took in his own name and right a new lease which he abandoned in October, 1920, after several months' unsuccessful effort at his own expense, labor and risk to discover commercial ore thereunder; that in [44] January, 1921, he reluctantly, at the instance of the lessor, re-entered the premises under a parol tentative arrangement with the lessor that if, after further exploration, he felt justified by the ore showing in requesting a written lease on better terms he could have it; that after several months further effort at his own risk, labor and expense he, in March, 1921, discovered ore justifying such request; that said parol tentative agreement was then consummated by the giving to him of a written lease dated back to the date of his last entry, to wit, January 1, 1921, and the same is the lease which he sold to the Orleans Hornsilver Mining Co. for said money and shares.

5. Said decree is erroneous, contrary to the evidence and against law and equity in this: that it necessarily implies a finding of fact and conclusion of law that because defendant Dunfee was the one-time active, and may be still the nominal, president, etc., of the Orleans Mining & Milling Co., he can forever be held to a duty to said company, while the said company, as shown by the evidence without conflict, wholly ceased since October, 1917, to function as a corporation, thereby wholly failing in its reciprocal duty to defendant Dunfee so to function.

6. The evidence shows without conflict that defendant Dunfee, as the owner of a leasehold estate in the Orleans mine, assigned the same to the Orleans Mining & Milling Co. on the express and implied condition that said company would keep said estate alive by operating and preserving said lease; that said company for over nineteen months wholly failed to perform said express and implied condition, for which reason said estate was lost both to it and defendant Dunfee; and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee was not entitled in such circumstances to retake said estate in his own right as a measure of rescission. [45]

7. The evidence shows without conflict that the Orleans Mining & Milling Co. not only had no means with which to operate said lease or any extension thereof, but had no effectual or *bona fide* intention, willingness or ability to raise means therefor, and said decree is contrary to the evidence and against

law and equity in that it necessarily implies a conclusion of law that defendant Dunfee, as a large stockholder in said company (and, *a fortiori,* as the original owner of said lease), was not entitled in such circumstances to take a new lease of said premises in his own right as a measure of salvage of his investment in said enterprise.

8. The evidence shows without conflict that the Orleans Mining & Milling Co. never by any act or omission of any kind evinced or held a hope or expectancy of a renewal of said lease, but on the contrary, by all of its conduct or want of conduct showed that it had no such hope or expectancy, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that in the face of such circumstances a lessee is in effect to be conclusively credited with entertaining such hope or expectancy.

9. The averments of the complaint show, and the evidence shows without conflict, that if plaintiff personally (apart from his character as a stockholder and officer of the Orleans Mining & Milling Co.) held any hope or expectancy of a renewal of said lease, it was wholly based on the terms of the pre-incorporation agreement pleaded in the complaint, and that this hope or expectancy was further based upon an outspoken belief on his part that under said pre-incorporation agreement he was entitled to follow into defendant Dunfee's hands any interest that the latter might ever in any way acquire in the Orleans property, although he, plaintiff, might in the meantime have wholly disregarded

his reciprocal obligations under said pre-incorporation contract; moreover, the evidence shows without conflict that plaintiff, in this [46] belief, knowingly and deliberately disregarded his said reciprocal obligations, and knowingly and deliberately laid back with the avowed intention on his part, while himself doing nothing to further the enterprise, to assert a right to the fruits if Dunfee succeeded, and to shirk all responsibility for the risk, time, labor and expense if Dunfee failed; and the decree is contrary to the evidence, and against law and equity, in that it implies a conclusion of law that plaintiff in so acting is not barred by his laches and unclean hands.

10. The evidence shows (*not* without conflict) that Terwilliger knew from the first of Dunfee's independent activities; it shows *without* conflict, and by Terwilliger's own admission, that he knew of Dunfee's independent activities as early as July, 1921, the date on which Dunfee's sale to the Orleans Hornsilver Mining Co. became public; nevertheless he and his attorneys, without excuse or explanation of any kind pleaded or offered in evidence, delayed the commencement of this suit until March, 1922; and said decree is contrary to the evidence and against law and equity in that it implies a finding of fact and conclusion of law that plaintiff in so delaying is not barred by his gross laches.

11. Said decree is contrary to the evidence in this, that said decree implies a finding, and the Court in its formal findings, Par. I, finds, that the "mine showing (in the leased premises) continued

to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," whereas the evidence shows without conflict, and all parties admitted without reserve throughout the trial, that said mine was wholly inactive from October, 1917, until after May 31, 1919; and the evidence shows without conflict that during said period of over nineteen months the mine was falling into decay and dilapidation and its movable machinery was stolen. [47]

12. Said decree is erroneous and contrary to the pleadings and the evidence in this, that the same implies a finding (and the Court found in writing in its written decision) that the leased premises were, until May 31, 1919, self-sustaining, whereas the complaint, Par. VIII, and Par. I of the Court's formal findings, declare, and the evidence shows without conflict, that said premises were not self-sustaining.

13. Said decree is erroneous and contrary to the evidence in this, that it implies a finding, and the court in its formal findings, Par. I, finds that "said defendant Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and property, and also to cheat and defraud plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and ap-

propriate to his own use and benefit the said property, on or about June 1, 1920, when said French Company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit: on June 5, 1920, obtain from said French Company a lease of said mining claims," whereas the evidence shows without conflict that Dunfee's conduct was pursued fairly, without concealment, under a belief and *bona fide* claim of right justified by all of the circumstances, after every duty that he owed to the Orleans Mining and Milling Company had been performed, and at a time when he owed no duty whatever to said company.

14. Said decree is erroneous in that it runs to plaintiff personally instead of to the Orleans Mining and Milling Co., on whose behalf plaintiff, as stockholder, brings this suit. [48]

15. Said decree is erroneous and against equity in that, while it adjudges that defendant Dunfee, in acquiring and selling the lease of January 1, 1921, was acting for the Orleans Mining and Milling Company, it allows him nothing for his risk, time, labor and expense.

16. The Court erred in overruling defendant Dunfee's motion that said cause be dismissed as to him, made at the commencement of the trial, upon and after the voluntary dismissal of the cause as to

defendant Orleans Hornsilver Mining Co., said motion being made upon the ground that the dismissal of said dismissed defendant left no cause of action stated against defendant Dunfee, in this, that plaintiff by his complaint elected to seek to recover the Orleans lease and mine in kind from its purchaser, the Orleans Hornsilver Mining Co., thereby repudiating the sale by Dunfee, while by the dismissal plaintiff sought to abandon said election, reverse his position, ratify Dunfee's sale, and follow the proceeds into his hands; to which ruling defendant Dunfee duly objected and excepted.

16*a*. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence against him statements attributed by witness C. A. Terwilliger to E. Carter Edwards, said to have been made not in Dunfee's presence, and without circumstances binding Dunfee by Edwards' declarations, as follows:

> The WITNESS.— . . . Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.
>
> Q. And what if anything was said?

Mr. TILDEN.—Is that offered for the purpose of showing any [49] agreement not embodied in that August 1st letter?

Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr. Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS.—Mr. Dunfee was not present at this conversation. . . . Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the futire extensions. . . .

18. The Court erred in admitting in evidence against defendant Dunfee statements attributed by witness Mrs. C. A. Terwilliger to E. Carter Edwards, made not in Dunfee's presence and without

circumstances binding Dunfee by Edwards' declarations, over defendant Dunfee's seasonable objection and exception, as follows:

The WITNESS.— . . . The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

Q. What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was [50] not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously, and your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this defendant.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his

being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleading that when a dissenting stockholder begins a suit, he should make defendants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

The WITNESS.— . . . Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than required by the lease would apply on future extensions of the lease. . . .

19. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence, through the witness A. I. D'Arcy the facts of the transaction whereby Dunfee sold the lease of January 1, 1921, as follows: [51]

Q. Was the transaction that you had with Mr. Dunfee with reference to this lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor

proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. . . . The contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of "thereto belonging" will be clear (reads): "In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining and Milling Company, consisting of a lease on the following five claims"—naming the claims—"together with all other extensions or purchases thereto belonging," evidently meaning belonging to said lease, "said second party agrees to raise," and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. . . .

The COURT.—I will overrule the objection,

and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now. [52]

20. The Court erred in allowing plaintiff, over defendant Dunfee's seasonable objection and exception, to amend his complaint, contrary to the evidence, and thereby materially departing from the cause of action stated in the complaint as filed, by changing part of the wording thereof to read: "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said Dunfee"—as follows:

Mr. TILDEN.—We object (to the offered amendment) on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney in fact for the lessor company. The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it

speaks for itself, and becomes a matter of law as to what it is and its character. . . .

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. . . . You ma*ke* take your exception.

21. The Court erred, over defendant Dunfee's seasonable exception, in denying the latter's motion to dismiss made at the close of plaintiff's case, as follows:

Mr. STODDARD.—That is the plaintiff's case in chief.

Mr. TILDEN.—At this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial, namely, that the dismissal [53] of the action as to the D'Arcy Company leaves no cause of action as to anybody. . . .

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

22. The Court erred, over defendant Dunfee's seasonable exception, in sustaining plaintiff's objection to a question propounded to defendant Dunfee seeking to establish the latter's good faith in taking the lease of June 5, 1920, as follows:

Q. When you took this lease of June 5, 1920,

what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that it is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

23. The Court erred in deciding said cause in favor of plaintiff and against defendant Dunfee.

24. The Court erred in rendering a decree in favor of plaintiff and against defendant Dunfee.

WHEREFORE defendant Dunfee prays that the said decree be reversed and the District Court directed to dismiss the bill.

AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Defendant Dunfee. [54]

[Endorsed]: Filed May 7, 1926, at 3:35 P. M.

Receipt of a copy of the within this 7th day of May, 1926, is hereby admitted, reserving all valid objections.

COOKE & STODDARD,
Attorneys for Plaintiff. [55]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, J. W. Dunfee, as principal, and Nevada Surety & Bonding Company, as surety, acknowledge ourselves to be jointly indebted to C. A. Terwilliger, appellee in the above cause, in the sum of One Thousand Dollars ($1,000.00), as indicated by the Judge allowing the appeal, conditioned that, whereas, on the 16th day of November, 1925, in the District Court of the United States in and for the District of Nevada, in the above-entitled cause, a decree was rendered against the said J. W. Dunfee, and the said J. W. Dunfee having obtained an appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit, and filed a copy thereof in the office of the Clerk, to reverse the said decree, and a citation directed to the said C. A. Terwilliger citinb and admonishing him to be and appear at a session of said Circuit Court of Appeals for the Ninth Circuit, to be holden in the city of San Francisco, State of California, on the 4th day of October, 1926.

Now, if the said J. W. Dunfee shall prosecute his said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and effect.

J. W. DUNFEE,
Principal.
By JNO. F. KUNZ,
His Attorney-in-fact.
NEVADA SURETY & BONDING CO.,
[Seal] By W. E. ZOEBEL,
Secretary,
Surety.

Approved May 7th, 1926.

E. S. FARRINGTON,
Judge, etc. [56]

[Endorsed]: Filed May 7, 1926, 3:35 P. M. [57]

[Title of Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Honorable E. O. Patterson, Clerk of the United States District Court, in and for the District of Nevada:

You are hereby requested to prepare and certify to the United States Court of Appeals of the Ninth Circuit, sitting at San Francisco, California, transcript on appeal in the above-entitled case, and defendant, J. W. Dunfee, hereby designates and indicates portions of the records, papers and files to be incorporated in the transcript on appeal, as follows:

1. Complaint.
2. Answer.
3. Decision.
4. Decree.
5. Statement of facts.
6. Petition for appeal and order granting same.
7. Assignment of errors.
8. Bond on appeal.
9. Waiver of citation.
10. Praecipe and proof of service thereof.

Dated: June 1, 1926.

AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Defendant, J. W. Dunfee. [58]

[Endorsed]: Filed this 2d day of June, 1926, at 9 A. M.

Service of the within, by copy, admitted this 1st day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiffs. [59]

[Title of Court and Cause.]

STATEMENT OF FACTS.

(On Behalf of Defendant J. W. Dunfee.)

BE IT REMEMBERED: That this cause came on to be heard in the above-entitled court on Friday, December 1, 1922, at 10:00 o'clock, A. M., before Hon. E. S. Farrington, Judge of said court;

Messrs. Cooke, French & Stoddard appearing as attorneys for plaintiff, C. A. Terwilliger;

Mr. Augustus Tilden appearing as attorney for defendant, J. W. Dunfee; and

Mr. M. A. Diskin appearing as attorney for defendant Orleans Hornsilver Mining Company, a corporation.

Whereupon the following proceedings were had and testimony and evidence introdused:

Mr. DISKIN.—On behalf of the Orleans Hornsilver Mining Company, we heretofore filed a motion for further and better particulars; the motion was presented to the Court, and I have been informed that your Honor advised counsel that the matter set [60] forth in paragraph "B" of the motion should be complied with. Your Honor will remember that the complaint in this case charged on information and belief, that the Orleans Hornsilver Mining Company had knowledge of certain alleged acts of fraud that were perpetrated by the defendant Dunfee, and we ask that we be informed as to what information the plaintiff had in that respect; and I have been advised by Mr. Cooke that your Honor had informed him we should be furnished with that information. I gave Mr. Cooke all the time he wanted to give me that information, but I have not been advised up to date who their informant was, or what that information was, and I think we are entitled to that information.

The COURT.—Was that a decision of the Court?

Mr. DISKIN.—I don't think there was any formal decision, but you advised Mr. Cooke that he should give me that information. No formal order was entered, and we haven't been advised of it.

Mr. FRENCH.—We have investigated that matter in connection with the Hornsilver Mining Company, and we have no satisfactory evidence, and at this time we move that the case be dismissed so far as the Hornsilver Mining Company is concerned.

Mr. DISKIN.—No objection.

The COURT.—Does that answer your objection?

Mr. DISKIN.—That is satisfactory.

Mr. TILDEN.—May it please the Court, in consequence of the dismissal as to the corporation defendant, the defendant Dunfee will move for a dismissal, on the ground that the dismissal of the corporation defendant constitutes an election, and that the effect of that election is to destroy any cause of action that the complaint might have stated against the defendant Dunfee.

(Argument on the motion.)

Mr. FRENCH.—I presume, your Honor is not familiar with complaint in this case, and I would like to read it. (Reads [61] complaint.) Now at the time Mr. Cooke drew that complaint, he had information, as stated, that the Hornsilver Mining Company took this property knowing all of the facts; we have since been unable to verify that statement by any proof, and for that reason we asked that the Hornsilver Mining Company be dismissed from the suit, because we will fail to connect it up with knowledge, but that leaves the defendant Dunfee in the same position he has always been.

The COURT.—Well, the motion will be denied

(Testimony of C. A. Terwilliger.)

for the present, and I will consider the whole matter later.

Mr. TILDEN.—I will ask your Honor to reserve the right to renew the motion at some future time.

The COURT.—Certainly; that can be brought up before the decision is rendered. As I understand it, the motion eliminates the Hornsilver Mining Company, and the Orleans Mining and Milling Company is still a party to the suit.

Mr. TILDEN.—One is plaintiff and the other defendant; the defendant company has been dismissed; the defendant company that remains becomes the plaintiff, this being a minority stockholder's suit on behalf of that particular defendant. (Reads answer of defendant Dunfee.)

TESTIMONY OF C. A. TERWILLIGER, FOR PLAINTIFF.

C. A. TERWILLIGER, the plaintiff, called as a witness, after being sworn, testified as follows:

Direct Examination by Mr. STODDARD.

My full name is Calvin Arthur Terwilliger. I am the plaintiff. I reside in California and was residing in that state at the time of the commencement of this action. I know defendant J. W. Dunfee. Have known him since 1907 to this extent, we have lived together in Rawhide, I think it was in 1908 for quite a little while, and we have been together more or less from time to time, I don't remember; we lived in the same house in Rawhide I think in 1908. From the time I met Mr. Dunfee

(Testimony of C. A. Terwilliger.)

up to the 2d day of September, 1916, we were friendly, what I consider intimate friends. I believe [62] the period of time we were occupying the same cabin in Rawhide and cooking, eating and sleeping in the same, was a couple of months.

I had a conversation or conversations with Dunfee relative to the Orleans property in Los Angeles prior to September 2, 1916, as a result of which I entered into a written contract with him relative to the Orleans Mining and Milling Company. (Witness is shown and identifies contract in question, a full copy of which is attached as exhibit to the complaint in this cause.

Mr. TILDEN.—This contract is admitted by the pleadings.

The WITNESS.—(Continuing.) After entering into that contract I made some payments of money to Dunfee under the terms thereof, in all eight thousand dollars ($8,000.00). I can't say the exact dates of three thousand ($3,000.00) of it, but I think on the 15th day of February, five thousand (5,000) was paid. The three thousand (3,000) was paid at various times; two thousand (2,000) was paid before I went up, and then the thousand (1,000) after I had seen the property. The two thousand was paid along from the time of the date of the contract up until I would say the first of the year or around there—between September and the following January. Three hundred thousand (300,000) of the shares of the stock of the Orleans Mining and Milling Company were issued to me. I

(Testimony of C. A. Terwilliger.)

sold thirty-three thousand (33,000) shares; I hold two hundred sixty-seven thousand (267,000) shares and have held same since some time right after the payment of five thousand dollars ($5,000.00) in 1917, the 15th day of February. At all times since about that time I have been and am now the owner of two hundred sixty-seven thousand shares of said stock. The date of incorporation of the Orleans Mining and Milling Company is September 16, 1916. [63]

Mr. TILDEN.—If you will state what you want to bring out by these preliminary matters I will admit them.

Mr. STODDARD.—These preliminary matters I want to bring out at this time are that Dunfee was the president, the general manager and a director of the Orleans Mining and Milling Company at all times from the incorporation of the company, or very shortly thereafter, up to the present time; and that Mr. Terwilliger is also the vice-president and director, and that E. Carter Edwards was the secretary of the company, and also a director.

Mr. TILDEN.—You have the right persons, and I will admit that they were such officers at all times that the company was operating as a corporation; that at all times it functioned, it functioned thru those people, and that no successors have been elected.

The WITNESS.—(Continuing.) Referring to the time of the payment of money aggregating eight

(Testimony of C. A. Terwilliger.)

thousand dollars ($8,000.00) by me to Mr. Dunfee pursuant to this contract—I had visited the Hornsilver property, that is, the mining property held under lease at Hornsilver once before I made the last payment. I was not there prior to the making of the first payment. I paid about two of the three thousand dollars before I was there—two thousand or twenty-five hundred, I am not sure which, before I was there at all. I was in Brawley, which is in Southern California, 250 miles south of Los Angeles, where payments of most of that money was made in cashier's checks or postoffice money orders.

(There was here admitted in evidence without objection a lease in words and figures following:)

PLAINTIFF'S EXHIBIT No. 2.

[Written across face of instrument:] "Cancelled May 30, 1919, for Non-performance of Monthly Shifts."

"THIS AGREEMENT OF LEASE, made and entered into this 19th day of June, 1915, by and between LE CHAMP D'OR FRENCH GOLD MINING COMPANY LIMITED, a corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7, Old Broad Street, E. C., and an Administrative seat in the City of Paris, [64] France, at No. 1, place Boiledieu, party of the first part and hereinafter referred to as the COMPANY; and Mr. J. W.

DUNFEE party of the second part, and hereinafter referred to as the LESSEE:

WITNESSETH, that the COMPANY for and in consideration of the rents, covenants and agreements hereinafter reserved and expressed, to be kept and performed by the said LESSEE, has leased and let, and by these presents does lease and let unto the said LESSEE, the following described premises and property, situate near the town of Hornsilver, County of Esmeralda, State of Nevada, to wit:

All those certain Lode Mining Claims in Hornsilver Mining District, known and designated as Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1, at and near the town of Hornsilver. AND also the machinery erected thereon together with hoist, tools, rails, etc., and more particularly described in Schedule i hereto annexed.

TO HAVE AND TO HOLD, for the purpose of mining, from the date hereof up to and including the 31*rst* day of May One Thousand nine hundred and seventeen (1917); said LESSEE in consideration of the premises covenant and agrees with the COMPANY, its assigns and successors, to work immediately after eleven days from date of this agreement, and to work the same continuously in a workmanlike manner, keeping the same securely timbered and to pay royalty to the company, its agent or attorney, as rental for said premises as follows to wit:

ROYALTY, flat rate of TWENTY SIX AND ONE QUARTER per cent (26.25%) on the full value of the ore shipped by the LESSEE, after deducting the sum of TEN dollars (10) per ton for transportation and reduction expenses and also the bullion tax, the said sum of ten dollars being agreed upon by both parties. The said ROYALTY to be retained by purchaser of ore and thereupon immediately paid by said purchaser to the credit of J. P. Charra, power of attorney for the COMPANY, or his successor. [65]

It is further understood and agreed between the parties hereto, that the LESSEE shall give the COMPANY a three day notice of the shipment of any and all ores and that the said LESSEE shall work at least sixty (60) shifts of one man during each and every month continuously during the life time of this lease and all work to apply to assessment work of the COMPANY.

During the term of this lease the COMPANY shall at any time have the right to ascertain the existence, state and condition of the tools, machinery and material, as described in Schedule i, and to call upon the LESSEE to make good to the COMPANY any parts of said tools, machinery and material that might be missing, destroyed or damaged. And the LESSEE, at the expiration of this lease, agrees to make good to the COMPANY all said tools, machinery or material that might have been lost, destroyed or damaged, during the term of said lease.

No assignment of this lease, or right to sublet said premises, or any part thereof, shall be made, without the consent in writing of the COMPANY being first had therefor.

It is further understood and agreed that should the LESSEE fail to work at least sixty (60) shifts of one man during any month, this lease would terminate at the end of the following month, and any ore extracted by the said LESSEE and not removed during the said following month, shall be and remain the property of the COMPANY.

It is hereby mutually understood and agreed, that in case any disagreements or disputes shall arise between the parties hereto as to their respective rights under this lease, or what is due or owing thereunder from the LESSEE to the COMPANY, for royalty or for any other matter that may come up for settlement or adjustment under its terms, that the COMPANY shall in such case or cases, choose one person, the LESSEE a second person, and these two a third person, as arbitrators, and such three persons so chosen [66] shall have the power to arbitrate, hear and decide finally, all such matters or questions that shall or may arise, or come up for settlement under the terms of this lease, and neither party shall have the right to appeal from the award and decision of such arbitrators, the right of appeal being hereby waived.

IN WITNESS WHEREOF, the parties hereto, the COMPANY and the LESSEE, have caused this instrument to be duly executed, signed, sealed and subscribed by their duly authorized representatives,

in the town GOLDFIELD, State of Nevada, this 19th day of June, 1915.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED,

By Its Attorney-in-fact:

J. P. CHARRA.

The Lessee: J. W. DUNFEE.

Signed and sealed in the presence of: Witness:

J. V. DUCEY.

(Endorsement): The foregoing lease is extended as follows: Provided that the Lessee is still working on the 31st day of May, 1916, this Lease is hereby extended up to and including the 31st day of May, 1918.

This Feby. 25, 1916.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY,

Trustee.

By E. CARTER EDWARDS,

Its Attorney-in-fact.

The foregoing Lease is hereby extended further, for another year, to wit: Up to and including the 31st day of May, 1919.

This April 18th, 1917.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED.

By E. CARTER EDWARDS,

Attorney-in-fact.

The foregoing instrument is marked Plaintiff's Exhibit 2.

The COURT.—I understand that Mr. Edwards is the attorney-in-fact for the lessor?

Mr. STODDARD.—Yes, the attorney-in-fact for the lessor. [67]

The COURT.—And the lessor is the French Company?

Mr. STODDARD.—The French Company, the owner of the claims.

The COURT.—What was his office in the other company, was he one of the directors?

Mr. STODDARD.—It has been stipulated that E. Carter Edwards was a director and secretary of the Orleans Mining and Milling Company, the lessee operating under this lease, which is in the name of J. W. Dunfee; and I will ask counsel at this time if it also may be stipulated that Mr. Dunfee assigned that lease to the Orleans Mining and Milling Company?

Mr. TILDEN.—Yes.

Mr. STODDARD.—And it was under that assignment this corporation was operating the mining claims as lessee?

Mr. TILDEN.—That is admitted.

The COURT.—He is a director, then, of the company to whom this lease was assigned, and also the attorney-in-fact who executes the lease on the part of the owner or lessor?

Mr. STODDARD.—Yes, your Honor. And I will also ask that it be stipulated that a power of attorney granting authority to E. Carter Edwards from the French Company appears of record in Esmeralda County, and that the assignments were made under that authority.

(Testimony of C. A. Terwilliger.)

Mr. TILDEN.—Yes. That the assignments were made under that authority? That is what you said.

Mr. STODDARD.—I should have said extensions instead of assignments.

Mr. TILDEN.—Yes.

The WITNESS.—(Continuing.) I am familiar with the signature on that receipt (referring to receipt dated February 15, 1917, exhibited to witness and reading as follows: "Received [68] eight thousand dollars ($8,000.00) in full payment as per Terwilliger-Dunfee agreement on Orleans Mining and Milling Company property" and purporting to be signed by J. W. Dunfee). Dunfee wrote that and handed that to me.

Mr. TILDEN.—The receipt of the money is admitted. We don't admit that the money was received on that date; it was received in various sums up to that date; I think that is the fact.

The WITNESS. — (Continuing.) The Orleans Mining and Milling Company after its incorporation proceeded with operations for mining and developing and extracting ores from the mining claims held by it under the lease. Those operations were actively in progress in 1917 the greater part of the time. I think that it was in the early part of 1917 that those operations were commenced, I would say around March, 1917, and from that time they were handling ore continually and mining and developing until, speaking from information that I have here to-day, November 8, 1918, when the property was closed down.

(Testimony of C. A. Terwilliger.)

Mr. STODDARD.—(Q.) I will hand you what purports to be a report of the officers and directors of the Orleans Mining and Milling Company, and the stockholders of the Orleans Mining and Milling Company, under date of August 1, 1918, and ask you to state whether or not you were present with any other officers or directors of the company at the time that that statement was prepared?

(A.) Yes, I was present. The statement was prepared in E. Carter Edwards' office in Goldfield, Nevada, about the 1st of August, 1918.

(Statement is offered and admitted in evidence without objection, marked Plaintiff's Exhibit 3, and is as follows:)

PLAINTIFF'S EXHIBIT No. 3.

J. W. DUNFEE, President and General Manager. C. A. TERWILLIGER, Vice-President.

[69]

ORLEANS M. AND M. COMPANY,

Mines: HORNSILVER, NEVADA.

REPORT OF THE OFFICERS AND DIRECTORS TO THE STOCKHOLDERS OF THE ORLEANS MINING & MILLING COMPANY.

The officers and directors of the Orleans Mining & Milling Company deems it fit and proper to signify to the stockholders of the Company a statement of their intentions and policy in conducting the business of the company during the present war emergency, and state the same as follows:

The management have always had in view the policy of making the mine self-sustaining, and have at all times paid its bills and running expenses, so that the credit of the Company has always been unquestioned. During the present war emergency, we believe this policy is particularly proper, because, as all thinking men know that the expenses of living and cost of material necessary to be used in conducting mining operations have greatly increased all over the country. The fact is also well known that the money that men of capital ordinarily invest in mines is now being almost all invested in some war industry, or in purchasing the Liberty or other bonds of the Government, or in making gifts to the Red Cross work of the Nation. It is easily seen, therefore, that the present is not the time to enlist capital for any other than a Government or war purpose, for we must be patriotic above all other things, and first help the Government to win the war. This is our slogan.

We are thus bound by our imperative duty, in the premises, and therefore, say it is unwise, and our efforts would be ineffectual if we tried to enlist capital at the present time to develop the mining property of the Orleans Mining & Milling Company. We have succeeded at all times in paying the labor and running expenses of the company, and are in good shape to take advantage [70] of any good luck, such as striking a good body of high grade or other pay ore, and in such event making the mine yield a handsome dividend, after paying all running expenses. And if we so

succeed the past good name of the company in honestly and economically conducting its operations on this property will fatten the good luck.

The present prospects of the mine are good, as on the 600 foot level after encountering some rather bad luck on the 400 and 500 foot levels in finding a leached-out condition and ore of so low grade as hardly to bear treatment under present conditions, we have uncovered a fine body of ore running from $45 to $50 per ton in the better class of it, with a larger amount ore of $15 to $25 per ton.

The owning Company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done.

The Company has also kept in mind the development of the property, and the ore mined has been milled at the nearby mill at Hornsilver, and the proceeds used in development work and payment of bills, and the deeper developments have been very encouraging as above stated.

The company has also an option to purchase the *the* property leased from the owning company, which can be exercised at any time we deem it practicable.

J. W. DUNFEE,
President.
C. A. TERWILLIGER,
V. President.

Dated Goldfield, Nevada, August 1st, 1918.
(Seal) E. CARTER EDWARDS,
Secretary.

(Testimony of C. A. Terwilliger.)

Mr. STODDARD.—(Q.) During the time of the operations of this company, from the time you have stated, about the month of March, 1917, up to the time of its closing which you have stated as being November 8, 1918, will you state who was in charge of the operations of the property? [71]

(Objection, discussion and ruling.)

Mr. TILDEN.—We will admit this, and probably it is all you want, and that is, all of the mining work was superintended and taken care of by Mr. Dunfee, overlooked by Mr. Dunfee; it was laid out by him, and he saw to it that it was performed; he hired the help, and paid it; everything that a man would do to open up a mine it fell to Mr. Dunfee's lot to do.

Mr. STODDARD.—And that would include the reports to stockholders?

Mr. TILDEN.—We will admit those reports as you produce them, they are very few.

Mr. FRENCH.—Do you admit that Mr. Dunfee had full and complete charge of the operations of the company on the grounds?

Mr. TILDEN.—I admit that under the By-Laws and the Articles of Incorporation, and the laws relating to corporations, and the resolutions of the board; if you want me to admit that *he any* authority as Dunfee, a person, to do anything, he did not; he looked precisely for his authority to those things that a corporation officer should and does look.

Mr. STODDARD.—I think that covers the matter.

Mr. TILDEN.—And I will make my qualification a little more; he wasn't doing that work under the contract of September 2, 1916, which we can conveniently call the 50–50 contract, but he was doing it in the capacity I have stated.

The COURT.—Just a minute. I would like to get that further condition which you attached to the stipulation.

Mr. TILDEN.—This case seems to be based on a contract that is set forth in full in the complaint; it is the contract that Mr. Terwilliger says he entered into with Mr. Dunfee in Los Angeles before the organization of his leasing company. Our theory is that after the company was formed, the office of the contract had been performed, that the contract was then [72] *functus officio,* you might say; that it did not govern the parties any more; that thereafter they were *govern,* as they had to be, by the laws relating to corporations; in other words, the obligations that they took on by forming the corporation were superior to the obligations that they took on by the contract, and thereby the obligations of the contract were merged in the obligations imposed by laws relating to corporations. If, for instance, a provision of this contract was contrary to the law governing corporations, it would be void, or would become void by the organization of the company.

The COURT.—I see now.

(Testimony of C. A. Terwilliger.)

Mr. TILDEN.—I will admit that this contract would have had this much effect if it had not been wholly superseded, that it was an understanding between these two parties how they would act as prospective officers of the corporation. Now, if in acting that way they were acting within the spirit of the laws of corporations, their act would be valid; if it was not within that spirit, then their act would be invalid, because contrary to public policy. It is rather fine but I want to keep within the limits of those admissions.

Mr. STODDARD.—(Q.) Mr. Terwilliger, I hand you a letter dated March 26, 1920, attached to an envelope addressed to you, and showing a postmark dated Goldfield, March 27, 1920, at ten A. M. and purporting to be signed by J. W. Dunfee, and having an endorsement written on the back in lead pencil, and ask you to state whether or not the signature of that letter is in the handwriting of J. W. Dunfee? (A.) Yes, sir.

(Q.) And whether or not you received that letter thru the mail? (A.) Yes, sir. [73]

(The letter and pencil endorsement thereon and envelope are admitted in evidence without objection, marked Plaintiff's Exhibit No. 4, and are as follows:)

PLAINTIFF'S EXHIBIT No. 4.

Geo. R. Hickernell, Proprietor.
Goldfield Hotel.
Goldfield, Nev.

March 26 (1920).

Friend Cal.

Rec your letter glad to hear from you.

In regard to Orleans if I can secure a 2½ years lease and option from Judge Edwards which I believe I can. Do you think you could take the old Co and get the money by selling stock to work it. We start out on a new Basses I got wise to the stock game

I have looked the state over and there a better chance on the Orleans than any thing I saw War times upset us Wire or write me what you are willing to try and do—or what you think could be done—the inducement are better now than ever before. We eventually get in our own mill

I feel fine now had my tonsols taken out absolutely cured my newritis hope you and Mrs. Terwilliger is well.

Yours Truly
J. W. DUNFEE.

(Pencil Endorsement:)

Ansd. Mch. 30/20

and stated would not raise any money on the old lines, and would not make any agreement about this matter by letter or wiring. Told him to come to Los Angeles and we would go into the matter in

(Testimony of C. A. Terwilliger.)

detail and come to some understanding for financing Co. C. A. T.

Last letter (X)

19—

(Envelope:) (In Pencil:) Mar. 27, 1920. [74]

(Goldfield)
(Mar. 27)
(10 AM.)
(1920)
(Nevada)

Geo. R. Hickernell, Proprietor,
Goldfield Hotel,
Goldfield, Nev.

C. A. Terwilliger
4419 Finley A
Los Angeles
Calif

(In pencil:) Last Letter
(X) (No. 19)

The WITNESS.—(Continuing.) The pencil memorandum on the back of that letter, Plaintiff's Exhibit No. 4, is in Mrs. Terwilliger's handwriting. The writing in pencil "Last letter" is in my handwriting, and that was referring to the last letter from Mr. Dunfee which I received. Number 19 refers to the envelope it was in, I think. I at one time had a letter to correspond with the envelope, and I think I made it 19 on the envelope, I don't know. As to the date the words "Last letter" were written, I would say it was some time during this year. I have replied to that letter. My reply is

(Testimony of C. A. Terwilliger.)

set forth by the defendant Dunfee in his answer in this case. I received communications and reports from Dunfee during the time that the Orleans Mining and Milling Company was in operation upon the leased property.

(The following letters were identified by the witness as having been written by and by the witness received from defendant Dunfee, admitted in evidence without objection, and marked respectively and in their following order Plaintiff's Exhibits Numbers 5, 6, 7, 8, 9, to wit:)

PLAINTIFF'S EXHIBIT No. 5.

J. W. DUNFEE, President and General Manager. C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

1/4/18.

Mr. C. A. Terwilliger,
Brawley, Imperial County,
Calif. [75]

Friend Cal:

At the present writing the Silver Mines Corporation have not as yet taken any of our ore. My last talk with Mr. Brady was that he would be ready shortly after the first of the year to give us our rates and that he would probably arrange to take one ton of our ore to two tons of his. From present indications however, it looks to me as though he is going to finish the Mill dump before taking any of ours. This will take approximately another thirty

days. Mr. Brady will be here sometime during the coming week and then I will be able to get definite information. As soon as I make definite arrangements regarding taking our ore I will let you hear further from me.

Wishing you a prosperous New Year, I am,

Yours Truly,
J. W. DUNFEE.

(Envelope:)
Orleans M. & M. Company, (Stamps 3¢)
J. W. Dunfee, Manager,
Hornsilver, Nevada.
(Pencil:) Jan. 1918.
(Goldfield)
(Jan. 6)
(6 AM.)
(1918)
(Nev.)
Mr. C. A. Terwilliger,
Brawley,
Imperial County,
California.
(Pencil:) No. 25.

PLAINTIFF'S EXHIBIT No. 6.

J. W. DUNFEE, President and General Manager. C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

Aug. 31, 1918.

Friend Cal.

I had delayed writing to give you something definite [76] the latest is the mill will run till

15 of Sept and meby longer. of course I had prepared to close so now I am hurrying my work in my East Drift on the 600 level. it looks like we have ore son to Day I have 1 foot of $22. ore. Do hope it widen. from winz shoot we shiped in the 20 minth of Aug 174. of ore. Best Run $25 gold. 2–04 oz silver total 27.22—which is good ore I havent don much with winz of late Now you and I Judge will adopt some sinsible policy to protect every body it has been Hell to handle this on the account of the ware Besid the difficulty with the Silver Mines Co. the Judge and I made a tript to Reno to force the Payment of the $17.26 the Silver M Co. owes us and got a strong order for them to pay at once so you and your stock holders can rest that you and I do our best to Pull things throug right the mining game is killed till after the war Will write you soon again.

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company, (Stamp 3¢)
J. W. Dunfee, Manager,
Hornsilver, Nevada.

(In pencil: Sept. 1918.)

(Hornsilver)
(Aug.)
(——)
(PM.)
(——)
(Nev.)

Reply inside 49.

C. A. TERWILLIGER
~~Hotel~~ ~~Munn~~ 5 ~~Olive~~ ~~St.~~
~~Los~~ ~~Angeles~~
Calif.

X Brawley.

(C)

(On back of envelope:)

(Los Angeles, Cal.)
(Sep. 3)
(12–P. M.)
(1918)

PLAINTIFF'S EXHIBIT No. 7.

J. W. DUNFEE, President and General Manager. C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada. [77]

May 24, 1918.

Friend Cal:

Just a few lines to say we are still in good ore in drift on the 500 feet level and are sinking shaft that make the shoot over 100 feet long up to date I not got any more money going after them again today the cort gave and order to pay for the ore

before the receiver. have looked every day for the check will make you a full report by next thursday

J. W. DUNFEE.

(Envelope:)

(In pencil: July 1918 44)

E. Carter Edwards, (Stamp 3¢)
Attorney at Law.
P. O. Box 1137.
Goldfield, Nevada.
No. 7.

Mr. C. A. Terwilliger,
Brawley,
California.

(Imperial Valley)
R D A.

PLAINTIFF'S EXHIBIT No. 8.

J. W. DUNFEE, President and General Manager. C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

(In pencil: Written by Edwards.)

C. T.

Mr. C. A. Terwilliger,
Brawley, Cal.

Friend Cal:

I received your wire yesterday in regard to the Orleans M. & M. matter and have turned this business over to Judge Edwards who will attend to same for us. The Silver Mines Corporation holds

our money in a deed of trust and it does not appear on their books as an indebtedness. At present I am shipping from 50 to 75 tons per day but will discontinue shipments at any time upon [78] the advice of Judge Edwards. The first money I received for ore was on the 9th inst. which amount to $1500.00 to cover the March pay-roll. Previous to this I had advanced all expenses for supplies and labor amounting to $2142.40 so you can see that I would be the real loser in case we failed to get out money. The ore we are shipping them is ore that I couldn't ship out at a profit and it is absolutely necessary that we let them have it if we expect to realize at all from it. Their superintendent informs me that they are depending on us almost entirely for production as they only have about 800 tons in sight at present that they can mill. This is the reason I am crowding my shipments otherwise they would probably close down. They closed down extending the drift from our shaft to their property the last of March. I want to extend this drift from 50 ft. to 75 ft. further and if we don't strike a body of ore I would be in favor of letting them have a portion of the ground adjoining them. We will have to work in unison with them to keep the Mill going or the Camp will fall flat.

Your representative here, John, I am depending on to keep you fully informed as to operations.

It certainly has been a tough proposition for me to finance this matter alone to tide it over without closing it down while waiting returns from the ore.

However, I managed to do so and the future looks much brighter. You know it takes lots of supplies and the labor runs high in the production of from 50 to 75 tons of ore a day.

If it becomes necessary to keep this mill running I may wire you to let me lease the Silver Mines Corporation some of our very low grade ore that we cannot handle at a profit. You must realize that in case anything should happen that would cause the mill to close down it would be as big a blow to us as to them and would kill our proposition. [79]

Trusting this will give you an insight as to how matters stand, I am

Yours very truly,

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company, (Stamp 3¢)
J. W. Dunfee, Manager,
Hornsilver, Nevada.

(Hornsilver)
(Apr.)
(11)
(PM.)
(1918)
(Nev.)

Mr. C. A. Terwilliger,
Brawley,
Imperial County,
California.

No. 8.
X Apr. 1918.
(C)

PLAINTIFF'S EXHIBIT No. 9.

J. W. DUNFEE, President and General Manager.
C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY,
Mines: Hornsilver, Nevada.

2/4/18.

Mr. C. A. Terwilliger,
Brawley, Calif.

Friend Cal:

I today made arrangements with the Silver Mines Corporation to start taking our ore on the 8th of this month and they have agreed to take 750 tons per month, their minimum treatment charges being $6.50 per ton up to $10.00, from $10.00 on up there will be an additional charge of ten cents on every dollar.

This rate is $1.00 per ton higher than I anticipated but it is the best I can do for thirty days. Hope later to get a reduction.

The Hardwick-Reed lease will close down on the 8th of this month and that portion of the ground then falls back to us.

During your visit here last Fall you spoke of [80] returning when we started to take out ore again. In case you are still of the same mind I have enough to do to keep you busy and will be glad to have you with me.

Trusting to hear from you at an early date I am,

Very truly Yours,

J. W. DUNFEE.

(Envelope:)

Orleans M. & M. Company, (Stamp 3¢)

J. W. Dunfee, Manager,

Hornsilver, Nevada.

(In pencil: Feb. 1918.)

(Hornsilver)
(Feb.)
(5)
(PM.)
(——)
(Nev.)

Mr. C. A. Terwilliger,

Brawley,

Imperial County,

Cal.

Mr. STODDARD.—We will offer a letter of date June 5, 1918, and signed by J. W. Dunfee; I will have the witness identify the signature. There is no address to the letter excepting "Dear Sir" (witness identifies signature as that of J. W. Dunfee).

(The letter is marked Plaintiff's Exhibit No. 10 and is as follows:)

PLAINTIFF'S EXHIBIT No. 10.

J. W. DUNFEE, President and General Manager.
C. A. TERWILLIGER, Vice-President.

ORLEANS M. AND M. COMPANY.
Mines: Hornsilver, Nevada.

June 5, 1918.

Dear Sir:

Well I wired you in regard to letting Brady take a lease on our ground from end of drift on the 200 foot level to their end line to surface Received your replyess have called a Director meeting approve of it I and Judge Edwards deem it best [81] as we are all trying to keep the mill going and working to get a reduction in our ore treatment now you and I are going to get along all O. K you xxx going to a fair deal and your stockholders to I am only trying to do best for boath of us so we can make some money now Judge Edwards think it best that Champ D Or Co not give us extension of lease as we retard (?) the camp with our conduct not letting Brady work his ground on through our shaft we are not using at present I had reserved ½ time for ourself I wanted them to extend drift so we could see if we wanted to sink shaft deeper as we have one small shoot going down and we would know whether we wanted to go to the expense of sinking Why you took the stand you did I am at lost for you told me to do what I thought best and I did hope you will come around all O K for Judge is determined to give the lease to him

(Testimony of C. A. Terwilliger.)

if he has to kick us out on the first of June next year.

Shiped 1510 ton of ore in May first half May came to 3800 or close sink shaft now have sank about 50 feet mine looks fair not shiping much as no ore in upper levels Will give you a detail report soon

J. E. DUNFEE.

The WITNESS.—(Continuing.) I was first on this property in Hornsilver about the first of January, 1917. Mr. Dunfee pointed out at that time the mining ground of these claims to me; I believe we walked over the ground. I don't believe we examined the surrounding territory as to whether any claims adjoining had been located, or whether it was open ground or not but I was given to understand it was all located, every bit of it for three thousand feet. I got that information from Mr. Dunfee. Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its [82] condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.

(Q.) And what, if anything, was said?

Mr. TILDEN.—Is this offered for the purpose

(Testimony of C. A. Terwilliger.)

of showing any agreement not embodied in that August 1st letter?

Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr. Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS. — (Continuing.) Mr. Dunfee was not present at this conversation. Mrs. Terwilliger, Mr. Edwards and myself were present in Mr. Edwards' office in Goldfield; we discussed the condition at the mine, and Mr. Edwards' idea and opinion of conditions on the proposition, and his and mine were identical. He said that under the present conditions it was evident it was impossible for us to do anything in regard to making any profit for the company, and that he believed that Bill (defendant Dunfee) thoroughly intended to

(Testimony of C. A. Terwilliger.)

close down as soon as he finished a [83] little work which he had started which he thought would open up some good ore. Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the future extensions, and that he had a letter from the French Company instructing him to extend the lease for another year, that is, to June 1, 1920, which would be done. Then he said that he would make a report out for the stockholders, and he started I think that day to make the report out, and submitted it to Mrs. Terwilliger and myself the next morning, and he read the report to us, and after reading the report to us he said to me, "How does that sound to you?" and I says, "That sounds all right, I think." He says, "If it is not strong enough, I can make it stronger." He at that time made reference to excess of shifts.

I think it was the day after this conference with Mr. Edwards that Mrs. Terwilliger and myself met Mr. Dunfee at the hotel, and we talked to him along the line of property, and he reported the conditions, and he said that he was intending to close down in a very short time, that is, that he had a piece of work that he wanted to complete, and then he was going to close down.

I had about that time a further conversation with Mr. Dunfee. This was at Hornsilver and Mrs. Terwilliger was present. It was about a day

(Testimony of C. A. Terwilliger.)

after we met at the hotel. Mr. Edwards and Mrs. Terwilliger and myself went down there from Goldfield in my car. Mr. Dunfee, Mrs. Terwilliger and I walked over the property and discussed it, and in the line of discussion Mr. Dunfee said, "Now, Cal, you leave it to me and everything will be all right, I will make us all some money."

I think that was the last conversation I had with Mr. Dunfee relative to this lease. I remained at Hornsilver a very short time, all told a couple of hours, and then Mrs. Terwilliger and I left for Big Pine. [84]

(Q.) At the time that you left what were your feelings in relation to Mr. Dunfee as to friendliness or confidence, or otherwise?

(A.) I felt just the same towards him as I had always felt towards him in years gone by when we had no business dealings or anything of the kind, perfectly friendly to him.

(Q.) Did you question or discredit in any way the statements that he made to you?

(A.) Not a bit.

The WITNESS.—(Continuing.) I can give the approximate number of shifts put in by the Orleans Mining and Milling Company during their operations from about March, 1917, to about the 8th day of November, 1918, only by judging the amount of men that were working at times when I went there. I imagine at different times I went there, there were from six to ten men working; that is, they were working different shifts. I

(Testimony of C. A. Terwilliger.)

think I was there three or four times after the formation of the corporation and the company was operating. I think the company worked and operated and mined that property continuously from early in 1917 until they finally closed down in November, 1918. I can't just recall now any time that they closed down. I never received any letters, telegrams, or communications of any kind from Dunfee after the time I received the letter dated March 26, 1920. I have never been in communication with him at any time subsequent to my letter to him of May 2, 1920. It first came to my knowledge *w*hat he had secured a lease upon the same property in his own name, about the middle of July, 1921. I received this information from a man by the name of John Duffey, who lives in Los Angeles at the Colonial Hotel. I got this information in Los Angeles. I immediately looked Mr. D'Arcy number up, and told him that I was a half-owner in that Orleans property.

(Last sentence stricken by consent.) [85]

(Q.) State any other action or steps that you took after being aware of the lease being taken in the name of Mr. Dunfee, and state what was done?

(A.) I went to Tonopah and employed Mr. Atkinson to look into the matter, and he took up the case, and he made a trip or two to Goldfield, and he didn't do anything, so I afterwards arranged with other counsel; it was several months before he notified me that he could not go on with the case, and then I secured the services of Messrs.

(Testimony of C. A. Terwilliger.)

Cooke, French & Stoddard. I think that was in March of this year.

Cross-examination by Mr. TILDEN.

The WITNESS.—The last time I saw Mr. Dunfee was in Hornsilver. As to where he was living, I understood he was in Divide and Hornsilver and Goldfield. I understood that from different people, and I believe that I have one letter from him that he was in Divide, that he was operating in Divide; I had a letter from him, I think, that gave me that notice when he was in Divide.

(Q.) Where is it?

(A.) I don't know whether we have it or not.

(Q.) A letter from Dunfee to Terwilliger advising Terwilliger that Dunfee was working in Divide.

Mr. STODDARD.—I haven't seen such a letter, if we have it I will produce it.

Mr. TILDEN.—(Q.) Do you recall the date of it?

(A.) No, I don't know the date, it was in 1919 tho, I think, that is, if my memory serves me I think it was in 1919. It was before the March 26, 1920 letter—

The WITNESS.—(Continuing.) At my last meeting with Dunfee at Hornsilver, when he said in effect that he was about to close down, he did not say how soon he expected to close down. [86] He said as soon as there was a piece of work he had started, as I understood it, as soon as he had

(Testimony of C. A. Terwilliger.)

completed that work which he expected would develop something good, that he expected to close down. I don't think that I protested against that at all, I don't think that I made any protest whatever. He did not tell me how long he was going to remain closed down, and I did not ask him.

(Q.) As far as you knew at that time, the close-down was to be indefinite, was it not?

(A.) My understanding was that it would be closed down until we made arrangements, he and Mr. Edwards and myself, to finance the property.

(Q.) To finance the property?

(A.) Yes, to get together.

(Q.) What arrangements did you and Mr. Edwards and he ever make to finance the property after that?

(A.) We never got together to finance the property after that.

(Q.) Now you say at this same meeting in Hornsilver he said to you in effect, you just leave this to me and I will make you all some money; is that right?

(A.) Everything will be all right, he said we will make some money out of it.

(Q.) Didn't he say, just leave this to me; isn't that what you told the Court?

(A.) That is the substance of about what I testified to.

(Q.) Tell the Court how he was going to make some money for you all if he was closing down

(A.) I never discussed that in detail at all.

(Testimony of C. A. Terwilliger.)

(Q.) You don't believe that there was any prospect of his making any money for you, do you? [87]

(A.) I never believed anything he ever told me.

(Q.) You never did? (A.) No.

(Q.) You haven't reason to state at this time that he ever told you anything untrue, have you?

(A.) What I am testifying to here has been the way I have always been with him.

(Q.) Well, answer my question: I want to know whether you can testify about anything at this time where Mr. Dunfee was anything but perfectly frank and honest with you, specify it if you can.

(A.) That he was anything but that?

(Q.) Yes.

(A.) Well, I would hardly know how to testify that way; I will have to have some instructions from the Court if I will attempt to testify, and how to testify; I can tell of course things that I have not been asked on the stand, I would have to refer to.

(Q.) I have asked you to specify any circumstance wherein Mr. Dunfee was anything but fair and open and candid with you.

The COURT.—That is a very broad question. You can give anything in response to that, that illustrates his unfairness to you, whether it is connected with this case or not, as I understand it.

Mr. TILDEN.—Anything.

(A.) I considered that I should have notification—

(Testimony of C. A. Terwilliger.)

(Q.) Never mind what you considered, I am asking you for a fact.

(A.) He didn't notify me when property I was interested in, when the lease was canceled, I wasn't notified when the lease was canceled, and I had always been told he could always get [88] extensions, and that I would always be protected, and that I was fifty-fifty with him in all of his futures in this property; that is the way I bought into the property; and he got $3,000 for my fifty per cent of its futures, and he took all that.

(Q.) You have put all that in your complaint, haven't you? (A.) Yes, sir.

(Q.) Now, just specify anything, any one particular conversation, or any one act of Mr. Dunfee's which you can tell the Court you think was unfair to you, or lacking in candor.

(A.) All right, I will refer you to a telegram Mr. Dunfee sent me, and he says you or your stockholders, I can't remember it exactly, but I will produce it in evidence.

(Q.) Please produce it; before you tell anything about it please produce it.

(Witness leaves the stand to get the telegram.)

(Q.) You have the telegram, have you?

(A.) Yes, sir.

(Q.) What is the date of it?

(A.) This is Goldfield, Nevada, May 31, 1918, C. A. Terwilliger, Brawley, California. You or your stockholders can get no extensions of lease or

(Testimony of C. A. Terwilliger.)
option; don't come up to talk with me, I am through with you.

(Q.) Well, is there anything lacking in candor about that, Mr. Terwilliger; if there is, tell us what it is?

(A.) Well, his attitude towards me after I had fulfilled my contract with him.

The WITNESS.—(Continuing.) Whatever ill feeling was implied by that telegram was removed at that time we were in Goldfield, and he established confidence again with me; that is, he made an apology for the sending of that telegram, and such as that. [89]

(Q.) Now, Mr. Terwilliger, let us go back to where we started: You said you met Mr. Dunfee in Hornsilver, and he told you he was going to shut the mine down, and he then said, "Leave everything to me, I will make money for you all"; tell the Court how he was going to make money for you all if he was going to shut the lease down?

(A.) He never mentioned any of his preparations, or anything further than that after the war was over that he and Judge and myself would get together and arrange some plan to finance the property.

(Q.) Then you knew when he said this to you, to wit, "Leave it all to me, I will make some money for you," that there was nothing in view whereby he was to make any money for you, did you not?

(A.) I thought we would get together, and that we would finance the property again; we had

(Testimony of C. A. Terwilliger.)

plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of $250,000, and turn the money into the company.

(Q.) From that time to this what did you ever do together, yourself and Mr. Dunfee and Mr. Edwards together, to discuss the financing of the lease?

(A.) I wrote to Mr. Dunfee to Divide, a letter of—

(Q.) Have you a copy of that letter to Divide?

(A.) Yes, sir.

(Q.) Let us have it.

Mr. FRENCH.—Here it is.

Mr. TILDEN.—What is the date of it?

Mr. FRENCH.—January 19, 1920.

Mr. TILDEN.—(Q.) Is this the letter that you refer to? (Hands to witness.) (A.) Yes, sir.

Mr. TILDEN.—May I read this, Gentlemen? [90]

Mr. STODDARD.—Certainly.

Mr. TILDEN.—(Reading:) "Brawley, California, January 19, 1920. J. W. Dunfee, Divide, Nevada. Friend Will: Have leased all my land in Imperial Valley, and we are moving back to our home in Hollywood about the first of February. Now I would like to hear from you regarding the Orleans property, and what your opinion is about its future. Not having seen you in Los Angeles during last summer as I expected, or hearing from you, I of course don't know how matters stand. I

(Testimony of C. A. Terwilliger.)

expect now to have time to do something, and when I see the stockholders they will want to know what the outcome of their investment is going to be, as everyone of them have figured that they would make some money up there. Please let me hear from you as soon as possible. Direct the letter to Brawley and it will be forwarded if we have left here. With best wishes for the New Year, I am, Yours very truly, C. A. Terwilliger."

(Q.) Assuming that this lease ran until May 31, 1920, that was, well, four months and a half before the expiration of the lease, was it not?

(A.) I wasn't assuming anything in regard to the lease at all, my understanding was entirely different; when I bought into this property I bought into it on a fifty-fifty basis.

(Q.) I am talking about what you knew about the terms of the lease; you knew the lease had been extended?

(A.) My information was that it would run until June 1, 1920.

(Q.) So that this letter that I have just read was written four months before the expiration of the lease, if that was the expiration point?

(A.) Yes.

(Q.) Well, you knew at that time that Mr. Dunfee was in Divide, did you?

(A.) That is where I heard he was. [91]

(Q.) Did you know how long he was in Divide?

(A.) No, sir, not the exact length of time. I had one letter from him, I believe, when he was in Di-

(Testimony of C. A. Terwilliger.)

vide, saying he was president of certain companies there in Divide.

(Q.) Did he answer this letter of January 19, 1920?

(A.) No, that letter was returned to me I believe unopened.

(Q.) Returned to you unopened. Well, you told the Court that this letter was one of the means that you took to bring yourself and Mr. Dunfee and Mr. Edwards together; when you answered that way did you know that this letter had not reached Mr. Dunfee's hands? (A.) Beg pardon?

(The reporter reads the question.)

(A.) Well, I must have known it, because it was returned to me. I don't think it was opened at all. I think the letter was returned to me marked on it "Not delivered for want of definite address," or something, I don't remember just what it was.

(Q.) Did you ever send it out again?

(A). No, not that letter.

(Q.) Tell the Court what other means you took after that last meeting in Hornsilver to bring yourself, Mr. Edwards and Mr. Dunfee together to finance the lease?

(A.) I wrote letters from Imperial Valley; I think there is a letter there among the letters, where I said it was our duty to get together and we ought to get together and try to do something to finance the property, and I wished that he and Mr. Edwards and myself would get together and

(Testimony of C. A. Terwilliger.)

do that. Now that letter must be there among the letters, if you will give us time—

(Q.) I would like to have you try to find it, if you will. [92]

(A short recess is taken at this time.)

(Q.) Did you find that letter, Mr. Terwilliger?

(A.) I haven't found that one letter, but here is a letter.

(Q.) What is the date of it?

(A.) Brawley, California, February 18, 1919. May I sit down and read this letter?

(Q.) Mr. Terwilliger, we are confining your testimony to a time after that meeting in Hornsilver.

(A.) A time after?

(Q.) Yes, after August 1, 1918. What is that date again?

(A.) This is all right. Brawley, California, February 18, 1919.

(Q.) All right.

(A.) (Reading:) "Brawley, California, February 18, 1919. Hornsilver, Nevada. J. W. Dunfee, Hornsilver, Nevada. Dear Sir: Your letter received, and it has taken me some time to go over the matter you mention with the stockholders. First I want to put you right regarding any misunderstanding with the stockholders here. The situation was explained to them thoroughly before they invested. They came to me entirely unsolicited on my part with the proposition for me to raise $8,000, five thousand dollars of which was to be expended on the property, and three thousand dollars

(Testimony of C. A. Terwilliger.)

was to be paid to you personally for your own use, and also you were to receive one-half interest in the capital stock of the new company. I raised this $8,000 for your proposition, and carried out my agreement with you in its entirety, and your continually harping on my interest not costing me a cent is ridiculously inconsistent and a false statement, so if you continue to be dissatisfied with your own proposition it is entirely your own fault and cannot be charged to [93] anyone else. To quote again from your letter, nothing you would like better than to meet all your stockholders and explain this to them. Now we have talked this matter over, and as you make frequent trips to Los Angeles it is only a little further to come on down to Brawley, and a good road all the way by the way of San Diego. We are all of the same opinion that the most satisfactory way to have a thorough understanding and to go over the whole situation, would be for you to come down here, then we could see what plans for the future could be mapped out, as your report shows that the property had deteriorated materially as far as the outlook for ore production is concerned, since the company began its operations, and we naturally supposed that arrangements could now be made for the purchase of the property at a much lower figure than heretofore. If you come down here we may be able to work out some intelligent method for financing the property. In conclusion I will say that if you come down here we will get together for the sole purpose of raising money for

(Testimony of C. A. Terwilliger.)

the purchasing of the property, as it is your and my duty to see this thing through, and make it a success if possible. I am willing and anxious to confer with you and get action to that end. Yours truly, (Signed) C. A. Terwilliger.''

Mr. FRENCH.—Here is another one.

Mr. TILDEN.—Before you get to the next, why didn't you call attention to the fact that you had an arrangement with him in Hornsilver, that he and Edwards and yourself should get together to discuss the further financing of the property?

(A.) Why didn't I call his attention to it? I can't exactly tell you why I didn't call his attention to it at that time, but being away from him I didn't think we could do anything when we were apart, and that the proper thing to do was for all of us to get together and figure on some plan whereby we could do something for the benefit of everybody concerned. [94]

(Q.) How is it that you failed to mention in that letter that Carter Edwards was to be a party to these future negotiations?

(A.) Mr. Dunfee was president and general manager and treasurer of the company, and he was the man I had always known, the man that I had all the faith in, and the man that was instrumental in me putting this money in there, and he is the man of course that I directed all of my correspondence to.

(Q.) I am questioning you with reference to what you said was said at Hornsilver.

(Testimony of C. A. Terwilliger.)

(A.) Beg pardon?

(The reporter reads the question.)

(A.) If you will just ask me that question again so I can get it, and I will answer.

(Q.) You told the Court that at Hornsilver Mr. Dunfee said you leave all this to me and I will make you some money, and that you understood by that, that you and Mr. Edwards and he would get together at some indefinite time in the future and discuss how this money was to be raised; now I am asking you why you didn't mention that in this letter you have just read; why did you make no reference to Edwards? (A.) To Mr. Edwards?

(Q.) Yes.

(A.) Mr. Dunfee was president and general manager, and I thought if he said to Mr. Edwards, now I have a letter from Cal and when we were to go down there and get together on this proposition, I naturally supposed Mr. Edwards would come on with him. I might have addressed the letter in the same language to Mr. Edwards.

(Q.) Well, did you?

(A.) I addressed it to Mr. Dunfee for the simple reason Mr. Dunfee was the man I had done the business with in the beginning, and I naturally addressed the letter to him. [95]

(Q.) Did you ever write any letters to Mr. Edwards to that effect, the effect of the letter you have just read?

(A.) I don't know just the exact language, but I referred in one letter to Mr. Edwards that I didn't

(Testimony of C. A. Terwilliger.)

know whether he was aware of the fact of the existing contract of mine, that existed with Mr. Dunfee; I referred to it in that respect, or something to that effect.

(Q.) I will ask you to get that letter presently; in the meantime you can get the letter which you say you have in addition to the one that you last read to Mr. Dunfee.

(A.) You want me to get the letter that I mentioned Mr. Edwards in?

(Q.) No, you say there is another letter there to Mr. Dunfee along the lines of the one that you last read.

(The witness leaves the stand to get the letter.)

(A.) Here is a letter to Brawley, California, April 9, 1919. Mr. J. W. Dunfee, Hornsilver, Nevada. Dear Sir: Not having received any reply to my letter of several weeks ago relative to financing the property, I am writing again to ask you what you are doing for the interests of the company, and I want you to meet me in Los Angeles as soon as you can arrange to be there, so that definite plans may be made for continuing operation. Please let me know promptly what your plans are as I must know. Very truly yours, signed, C. A. Terwilliger.

(Q.) What is the date of that?

(A.) That is Brawley, California, April 9, 1919.

(Q.) Did you get an answer to that?

(A.) Yes, here is a letter dated April 12th, and it must be an answer to this.

(Q.) Is that a letter from Mr. Dunfee to you?

(Testimony of C. A. Terwilliger.)

(A.) Yes, sir. [96]

Mr. STODDARD.—That is a copy; we don't seem to have the original.

Mr. TILDEN.—What is the date of it?

(A.) April 12, 1919. Do you want me to read the letter-head and all?

(Q.) No just give the place and the date.

(A.) (Reading:) "Goldfield, Nevada, April 12, 1919. C. A. Terwilliger, Brawley, California. As you gave me my orders what to do in regard to the Orleans, I closed and paid up bills, then when your threatening letter came, I proceeded to have an expert accountant go over things at more cost to me. I have worked this property for the company conscientiously so that it has broke my health over worrying. Our lease has been closed now six months, and I will accept your conversation with Mrs. Dunfee as your true feeling towards me. It will be impossible for me to meet you in Los Angeles as I am interested in three companies in Divide District which is on the curb in New York, that keeps me here till some time this summer. I have nothing but friendly feeling for you, and be glad to talk to you on business matters. Yours truly, J. W. Dunfee."

(Q.) What is the date again?

(A.) That is April 12, 1919.

Mr. STODDARD.—You are going to put in the others in connection with that, are you?

Mr. TILDEN.—They can go in, they have all been read into the record.

(Testimony of C. A. Terwilliger.)

(Q.) Did you ever attempt to meet Mr. Dunfee after that letter that you have just read?

(A.) After this letter?

(Q.) Yes.

(A.) The letter that I wrote in 1920, and wanted him to come to Los Angeles, I wrote first and he answered my letter, come to Los Angeles and we would get together.

(*A.*) Answer my question.

(A.)That is after; that is after that letter, yes, [97]

(Q.) Did you ever try to meet him after writing the letter you have just read?

(A.) Is the date of that 1919? Yes, sir.

(Q.) How did you try?

(A.) I wrote him a letter to come to Los Angeles; I wrote him first and asked him about the property, and then in answer to that he wrote me a letter, and asked me what I thought could be done.

(Q.) What effort did you make to meet him?

(A.) I wrote him to come down there.

(Q.) Besides writing him to come down there, what effort did you make to meet him?

(A.) I thought financing the property would be done down there, and our meeting—

(Q.) Answer the question.

(A.) That is the effort I made to meet him, when I wrote him that letter and told him to meet there in Los Angeles; and also that letter of mine I think that I wrote to him in Divide was after that letter, I think, that one that was returned to me.

(Testimony of C. A. Terwilliger.)

(Q.) When he wrote you that he could not go to Los Angeles, why didn't you try to go to Nevada?

(A.) At that time?

(Q.) Any time.

(A.) I didn't get any letter from him after I wrote him to come down there.

(Q.) You just read a letter in which he said that he could not go to Los Angeles.

(A.) That was at that time, I was in the same position at that time that he was; I had business which kept me down there at that time, in the Valley.

(Q.) Did that business that you had keep you there continually until July, 1921? [98]

(A.) No. Until July, 1920, you mean?

(Q.) No, 1921, the time you say you discovered these facts.

(A.) No, but between that time I wrote him two letters, I think it is, and wanted him to come and meet down in Los Angeles, because in Southern California was where I figured on raising the money to finance the property; we had 400,000 shares of stock in the treasury, none of it sold; I had sold my own stock and turned every bit of that money in.

(Q.) You knew the lease could not run without money, didn't you?

(A.) I had no direct concern in the lease, I—

(Q.) Answer the question: You knew the lease could not run without money, didn't you?

(A.) I suppose.

(Testimony of C. A. Terwilliger.)

(Q.) You knew that if you and Dunfee and Edwards didn't get together and arrange for money, that the lease would not run, didn't you?

(A.) Yes.

(Q.) What did you expect would happen to the lease, that it would be continued indefinitely without any work being done on it?

(A.) No, sir; I figured I had put my money in there, and that I had assurances from E. Carter Edwards, his final remark to me was, you go back to Imperial Valley and tell your stockholders not to worry, that their investment will be protected in every way; that was in 1918, about August 3d or 4th, when we were leaving Hornsilver; that was my assurance from E. Carter Edwards, secretary of the company, and I naturally had faith in Mr. Dunfee and him, and supposed they were two of them, and I was alone, that they would come where the money was forthcoming when they wanted the money; they were there together before, and everything was fine, and I was treated with the utmost respect; after I put the [99] money in, after I made the protest, after I had put $8,000 in and I raised a protest I was insulted.

(Q.) Never mind; you have answered the question. To get back to the question I asked, how did you expect the lease to run without money?

(A.) I didn't; and I expected to help finance that property, if they would come where the finances were; I considered it a waste of time to go to Gold-

(Testimony of C. A. Terwilliger.)

field to raise money, because I didn't consider it was there.

(Q.) Did you expect the lease to be indefinitely extended without any work?

(A.) I didn't expect it to be indefinitely extended without any work, but I will tell you what I did expect.

(Q.) All right.

(A.) I expected whenever that property was in the name of J. W. Dunfee, that me and my stockholders stood fifty-fifty with J. W. Dunfee, that was my direct understanding in this proposition, and the only understanding I ever had, and I never sold a share of stock to the stockholders without citing them to the fact that I was fifty-fifty with J. W. Dunfee; that was my statement to them in detail, and that I would never be thrown out.

(Q.) Now listen to this question: You stated you knew the lease could not run without money, and you stated that you knew the lease could not run indefinitely without work, when did you expect that lease to cease?

(A.) I expected, as I told you, to help to finance that property.

(Q.) When did you expect the lease to cease?

(A.) I expected at all times if Mr. Dunfee had anything to do with that property to be protected. [100]

(Q.) Is not this the situation, Mr. Terwilliger, that you were simply holding Mr. Dunfee to any property that he might ever get on that Orleans

(Testimony of C. A. Terwilliger.)
ground, whether it was under this lease we have been discussing or any other instrument; that is your position, isn't it?

(A.) My understanding with—

(Q.) Never mind; what was your position?

(A.) I am going to tell you my position with Mr. Dunfee, if the Court will allow. My position with Mr. Dunfee was, and my understanding with him, that as soon as he ever got a lease or purchased an option or anything on that property, I was fifty-fifty with him; that is why he took three thousand dollars, and used five thousand dollars for the development; I bought my interest in the property, in the futures, and he took three thousand dollars, and it is referred to in a letter where they wanted him to kick me out, as they were sore because he had given me one-half.

The WITNESS.—(Continuing.) I read the complaint in this action before swearing to it. I think that I was satisfied before swearing to it that it stated my complaint against Dunfee. I am forty-eight years old and have been in business more or less all my life. The complaint to the best of my understanding sets forth what I claim as against Mr. Dunfee.

(Witness' attention is called to the following allegation in the complaint:)

> "Also, that he, the said Dunfee, was on very close and intimate terms with said French Company, and particularly with the said E. Carter Edwards, who was the agent and attor-

(Testimony of C. A. Terwilliger.)

ney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that [101] might be desired by plaintiff, the defendant Dunfee, or the corporation to be formed."

The WITNESS.—(Continuing.) I never at any time told Mr. Dunfee or ever expressed the desire to have the first lease extended after the lease shut down. I never had dictated to him about the lease.

(Q.) I am not asking whether you dictated; you have used the word "desired" here; you say that he was to get an extension that was desired; now the lease shut down in November, 1918?

(A.) Yes, sir.

(Q.) Tell the Court when after that you expressed a desire to have the lease extended.

(A.) I can't say that I ever conferred with him.

(Q.) Can you say that you never did express that desire?

(A.) I never made a demand on him about getting extensions at all.

(Q.) Now you say also that the extension was to be procured if the corporation desires; can you tell the Court at any time after that lease shut down that the corporation expressed a desire for an extension of it?

(A.) Never in writing, or I don't think verbally we ever did.

(Q.) Take that paper again and I will read a

(Testimony of C. A. Terwilliger.)

little further down. (Reads:) "and wholly trusted and depended upon the said Dunfee, and believed and relied on his statements that he alone could obtain such extension or renewals and that he would obtain same for the use and benefit of said corporation whenever deemed desirable or necessary:" You add the worw "necessary," do you know of the corporation every taking any action in which [102] it declared it necessary that that lease be extended? (A.) No.

(Q.) Now I call your attention again to the first part of that language, that you wholly, that is the plaintiff, yourself, "wholly trusted and depended upon the said defendant, Dunfee, and believed and relied on his statements that he alone could obtain such extensions or renewals." Did you follow me as I read that? (A.) Yes, sir.

(Q.) Didn't you obtain at least two extensions?

(A.) Personally?

(Q.) Yes.

(A.) Never; never made application for them, never; never made application for them.

(Q.) In this lease which is in evidence, I call your attention to the second endorsement, reading, "The foregoing lease is hereby extended further, for another year, to wit, up to and including the 31st day of May, 1919. This April 18th, 1917." French Company by Edwards attorney in fact. Didn't you obtain that extension yourself?

(A.) Never; never saw that piece of paper that I know of before.

(Testimony of C. A. Terwilliger.)

(Q.) Where were you in April, 1917?

(A.) I may possibly have been in Nevada in 1917; I don't know, I can't swear to that, where I was, without I would look up something that would substantiate my testimony, and I can't say right now where I was at that time. April, 1917?

(*A.*) April, 1917.

(A.) I don't think I was in Nevada, I don't know; I think I was there in February; you say I was there February 15, 1917, and I would not be sure; I am quite sure I wasn't in Nevada in April. [103]

(Q.) There were three extensions, weren't there?

(A.) I don't know the number of extensions. As I say, I had never given that extension proposition any attention, because I relied solely on Mr. Dunfee.

(Q.) Mr. Terwilliger, I asked you if there were not three extensions.

(A.) I can't tell you about the number of extensions.

(Q.) If there were not three extensions how do you claim that the lease continued until May 31, 1920?

(A.) I suppose that there was the lease that we began on in 1916, which ran to a certain point, and then that there were two extensions from that time on, that is what I thought.

(Q.) Now, Mr. Terwilliger, I just read you this second extension, and I will read it again: "The foregoing lease is hereby extended further for an-

(Testimony of C. A. Terwilliger.)

other year, to wit, up to and including the 31st day of May, 1919." Now if another extension in addition to that was not procured, how do you claim that the lease extended to 1920?

(A.) I never mentioned this—as I gave evidence this morning, Mr. Edwards advanced that information, and I never made mention of it; he says, I have also received instructions from the French Company, that is, not instructions, something to that effect, granting an extension of the lease until June 1st, 1920; that was in his language. I don't see it still; have you got that lease, or anything of the kind? I never insisted for that lease at any time, I was assured at the time that I went into this proposition that that was not my business, I wasn't questioned about getting that myself; I have a letter there where Mr. Dunfee refers to it and says I could have the lease as long as I wanted it, as I told; it is in a letter.

(Q.) What did you and Mrs. Terwilliger go to Goldfield [104] for in August, 1918?

(A.) Eighteen? We went up there on business.

(Q.) What business? I don't ask your private business, but was it business in relation to this lease?

(A.) We went up there to see the property, and see Mr. Dunfee and see Mr. Edwards.

(Q.) Anything else?

(A.) That was about the extent of our business up there.

(Testimony of C. A. Terwilliger.)

(Q.) You went into his office, I suppose, in Goldfield?

(A.) Mr. Edwards' office in Goldfield first.

(Q.) And he started in by informing you that the French Company had authorized him to extend the lease, did he?

(A.) No, sir. He started in—we discussed the property, the condition of it at the mine, and everything of the kind in general, that was our first discussion; that was our first discussion.

(Q.) How did this question of the extension come up?

(A.) He mentioned that after we had talked a little bit, and he said under present war conditions, high prices, and such as that, that it was impossible to make any money running the property at this time, and he said that he was satisfied that Bill intended to close down as soon as he had done some work which he had started; we were talking then, and he says, the excess work we have done, excess shifts, will apply on future extensions.

(Q.) How did he come to mention this question of extensions?

(A.) I don't know at all.

(Q.) Didn't you bring it up with him at all?

(A.) No, sir, I did not.

(Q.) He just volunteered the information? [105]

(A.) Mr. Edwards was at that time running for district attorney, and he was very affable and very talkative and very fine, and he talked right off the

(Testimony of C. A. Terwilliger.)

reel, I didn't draw him out at all; I don't know as I mentioned, I could not swear on the stand that I ever mentioned and said to him, now did you do so and so, did you get this lease, did you get this extended; I never made any mention of that thing, or anything of the knid; this question was gone into in details, and he talked freely and I talked freely.

(Q.) You thought it important enough to put it in that August 1st report, didn't you?

(A.) In the report which was read here?

(Q.) Yes.

(A.) Thought it was important enough? Mr. Edwards was secretary of the company, I was not; he put that in there, I didn't dictate that report.

(Q.) You signed it, didn't you?

(A.) I signed it, but I didn't dictate it, not one word of it.

(Q.) Didn't you get it up together?

(A.) No, sir. Mr. Edwards says I will make out a report for you to take down to the stockholders; he started in that evening, I believe, to make this report out; the next morning we went into his office and he handed me this report, and stood there, and I read the report over, or he read the report to us, that is the way it was; and he said, "How does that sound to you?" I says, "It sounds good to me," and he says, "If it is not strong enough I can make it stronger."

(Q.) Did you read it yourself at any time?

(Testimony of C. A. Terwilliger.)

(A.) I read it afterward, I am not positive, I don't know how soon after or anything of the kind.

(Q.) Did you read it yourself before you signed it?

(A.) He read it to me, I believe; I might have read [106] it myself before signing it.

The WITNESS.—(Continuing.) Mr. Edwards also volunteered that the past work could be credited on the future work. We have done a great deal of work in excess. I regard that as an important matter and certainly must have so regarded it at that meeting, because I said it sounded all right to me. He read that report to me, and I said it sounded all right to me.

(Q.) Will you kindly take that report and see where there is anything about crediting past work on future requirements?

(A.) I don't believe that was in the report.

(Q.) Why did you not call Mr. Edwerds' attention to the fact that it was not in the report?

(A.) Because I was not the dictator of any part of that report; if I had been it would have been different.

The WITNESS.—(Continuing.) I do not recall ever having read a certain ten page letter from Mr. Edwards to Mr. Cooke in which he went into all of the facts of this case as he understood them.

The WITNESS.—(Continuing.) I had no knowledge that would lead me to know whether or not Mr. Dunfee had resumed work on the Orleans lease after October 10, the day of shutting down.

(Testimony of C. A. Terwilliger.)

From that date to the date of the expiration of the lease, assuming that the lease was extended to May, 1920, was twenty months.

(Q.) You don't know what was happening in that twenty months?

(A.) Some correspondence is referred to, and I think some read, where I tried to get together.

The WITNESS.—(Continuing.) I had never financed this property at Hornsilver or Goldfield. I used to come when I thought it necessary to look after the affairs of the company. One time when I thought it necessary I came to Hornsilver and Goldfield, [107] then to Reno on the receivership matter; Mr. Dunfee was very busy and asked me to go up there with Mr. Edwards.

(Q.) Didn't you think it necessary at any time during that twenty months of supposed idleness to come and find out whether anything was going on in that line?

(A.) Well, I was going to say that I never—

(Q.) Did you or did you not?

(A.) I am going to answer you this way,—I will have to answer you this way; I didn't think it was possible for me to do anything in this proposition line; now I will tell you why I must have a reason for thinking I could not do anything alone; now I was to have been president and general manager of this company the second year, Mr. Dunfee came down to Los Angeles the second year, and we had a conference in the Alexander Hotel, and I told

(Testimony of C. A. Terwilliger.)

Mr. Dunfee, I said, Mr. Dunfee, I said, Bill,—I says to Mr. Dunfee—

(Q.) From October 10th, 1918, to May 31, 1920, why didn't you go to Hornsilver and find out if the lease was in operation?

(A.) Because I wasn't president and general manager of the company, and my contract was with the president and general manager of the company, that is why I didn't do it, had I been president and general manager you can rest assured I would have been there.

(Q.) You hadn't any reason to suppose that any work was going on, had you?

(A.) I didn't have any reason to think it was, I—

(Q.) You knew the treasury was empty, didn't you?

(A.) Yes, I believe he told me when we were up there, there was about nine hundred dollars in the treasury, when we were there in 1918. [108]

(Q.) You knew the property wasn't self-sustaining, didn't you? (A.) Yes, sir.

(Q.) And you knew that the lease would expire by its own terms, assuming that it was extended on August 1, 1918, would expire by its own terms on May 31, 1920; that is right, isn't it? (A.) Yes.

(Q.) And you never went near it?

(A.) But I knew also that I was protected, and my stockholders were protected, because the thorough understanding if Mr. Dunfee had in fact gotten that property in his own name we would

(Testimony of C. A. Terwilliger.)

have been loser, I understood all that, my stockholders understood that, my stockholders all understood that as soon as Mr. Dunfee ever acquired that property I was selling them an interest in, that I had fifty-fifty—

(Q.) Let me ask you another question: You told Mr. Dunfee to shut down, didn't you?

(A.) He had told me three or four months before that he intended to close down, then at the final—possibly, I know I wrote to him, and told him that my advice to him would be to close down the property immediately, because we were not realizing a dollar on it, and I thought the property could be financed much easier with lots of ore in sight than it would be to work the property out, you understand, and not have anything in sight.

(Q.) So your idea was that he should close down in order that there should be a lot of ore in sight?

(A.) If we were going on to finance it with the 400,000 shares not sold.

(Q.) And he then told you he was about to exhaust the little ore that was in sight?

(A.) Beg pardon? [109]

(Q.) Well, let that go. You read that letter set forth in the answer,—did you read that letter, or did you hear me read it this morning?

(A.) I don't remember the letter you have referred to.

Mr. STODDARD.—You might mention the date.

Mr. TILDEN.—It is September 30, 1918.

(Q.) I show you a letter purporting to bear

(Testimony of C. A. Terwilliger.)

your signature; it is dated September 30, 1918, and this is the letter set out in the answer; is that your signature?

(A.) Yes, sir. that is my signature there.

Mr. TILDEN.—We offer this letter, may it please the Court.

Mr. FRENCH.—No objection.

(The letter is admitted in evidence, marked Defendant's Exhibit "A," and is as set forth in the answer.)

Mr. TILDEN.—(Q.) In this letter you say: "Now would say in regard to the mine, it is my opinion and all of the stockholders here"; those are the other men that you represented in this case, aren't they? (A.) Yes, sir.

(Q.) (Reading:) "That under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running, and we are not in favor of you putting up your money in running the property and placing the company under obligations and being indebted to you." Did you ever withdraw this letter? Did you ever tell Mr. Dunfee I have changed my mind about what I told you on September 30, 1918, and I think you had better start in to work?

(A.) I don't believe I ever did. Did you read that letter in its entirety, did you read all of it?

(Q.) No; do you want me to read it? [110]

(A.) That is all right.

(Q.) Now you say here also: (Reads:) "And also in view of the fact that we have done a very

(Testimony of C. A. Terwilliger.)

large amount of work more than our lease calls for, we are certainly entitled to close this property down until the end of the war, when we can do something with a fair chance of getting some returns for our investment—besides the experience." Why didn't you state in this letter that Carter Edwards had told you the old work could be credited on the future work?

(A.) I didn't think it was necessary for me when Mr. Edwards and Mr. Dunfee were so close together, connected as they were, and had been for years, it was necessary for me to submit something to Mr. Dunfee to be considered by him or Mr. Edwards; I knew that I stood between them, that is, that I was simple a come-between in the way I figured it; Mr. Dunfee and Mr. Edwards were there, and they were on the property.

(Q.) You put into this letter every reason you could think of for shutting down, didn't you?

(A.) I don't know, there might have been possibly some other reasons I didn't put in there.

(Q.) If you had thought at that time Mr. Edwards had told you past work would be credited on the future, you would have put it in there, wouldn't you? (A.) One reason—

Q.) Wouldn't you have put it in the letter?

(A.) I could not say that I would; you have asked me the reason why I didn't put it in, I was going to give it; I had assurance on this proposition as to where I stood, I had assurance of exactly how I stood with Mr. Dunfee on this property.

(Testimony of C. A. Terwilliger.)

(Q.) I will read this also: "Whether the mill closes down or not, it is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any [111] more ore or money." Did you ever withdraw that advice? (A.) I don't know that I ever did.

The WITNESS.—(Continuing.) I recall the report of November 6, 1918, rendered just after closing down.

(The report referred to is identified by the witness, admitted in evidence without objection, marked Defendant's Exhibit "B," and is as follows:)

DEFENDANT'S EXHIBIT "B."

C. A. TERWILLIGER,
Vice-President.
J. W. DUNFEE,
President and General Manager.
ORLEANS M. AND M. COMPANY.
Mines: Hornsilver, Nevada.
November 6th, 1918.

To the Stockholders, and C. A. Terwilliger, Vice-President of the Orleans Mining and Milling Company:

Gentlemen:

Inclosed find financial statement of past year's business of Orleans M. & M. Co. The conditions have been so unfavorable owing to the war, high prices, and inefficiency of labor, that it has been deemed best to close down the mine. The mine is entirely free from debt, and no trouble can come from creditors, as there are none.

As to the future of the mine, will make the following recommendations: Extend the drift on 600 ft. level to the East. On drift on this level we have been in a big body of low grade quartz for the last 150 feet, with a small rich seam laying in the quartz. At time of closing down mine, have not encountered pay ore shoot in the drift to the East as we had expected from the rake of the shoot from the upper levels. Indications are good for the shoot still to come in. To the west drifted 65 ft. on the 600 level. From a winze at this point I took the last shipments and found some very rich ore at bottom of winze. Owing to high cost of mining, etc., could not underhand-stope this ore out at a profit.

Would recommend sinking shaft to 700 ft. level to [112] get in under the body of ore. From my experience gained in development of the mine, I consider this the most encouraging point for development work. The upper levels to the 600 have been pretty well mined out, and the dump ores as well as all ore that could be mined at a profit at this time, have been shipped to the Silver Mines Corporation for treatment at its mill.

On the Orleans No. 3 claim, Old Shaft, the Silver Mines Corporation under permission from us, drifted from a point 250 feet west of shaft on the 200 ft. level about 340 feet northwesterly to the side line of No. 3 claim. The first 40 feet of this work followed the vein, and a cross-cut was made through about 8 feet of quartz that assayed about $5.00. The balance of the distance to the side line, the foot wall

(Testimony of C. A. Terwilliger.)

side of the vein was followed, and the vein was not cross-cut, and no further ore was found, which no doubt would have been the result had the vein instead of the foot wall been drifted on. This work to the side line, develops this ground at this point and shows the vein tendency is to be large and permanent, with large bodies of low grade quartz. This Old Shaft was originally sunk a depth of 300 feet and a drift extended from it 126 feet to the west, but it was filled up to the 200 foot level by the French Western Company, a former owner, and the drift to the west was never driven far enough to reach these bodies of quartz downward.

For future development, I also recommend that this shaft be cleaned out and this drift on the 300 foot level be extended from its present extension to touch the large bodies of quartz extending downward from the 200 foot level.

The visible ore in the mine except as above indicated has been pretty well worked out in the different levels, and the success of the mine in the future will require proper [113] development to disclose the ore bodies that diligence and perseverance will discover no doubt.

Respectfully submitted,

J. W. DUNFEE,

President and General Manager.

The WITNESS.—(Continuing.) As to the fairness of that report, I was advised by Dunfee, president and general manager, that we had a better chance there then any other place he had seen, and

(Testimony of C. A. Terwilliger.)
he had traveled all over Nevada, and there was every reason in the world for me to believe that it was possible for us to finance the property and purchase it. He told me that in March, 1920.

(Q.) I am talking about November 6, 1918; if there is anything unfair about that report tell the Court about it now.

(A.) I would say that I wasn't on the property; Mr. Dunfee was the man down the mine, he was the man that reported to me, and I always took his reports as they were written; I paid $2,000.00 on the property before I saw it, so if I had had no confidence in Mr. Dunfee that establishes the fact with me that I believed absolutely in what he told me, I was willing to give him $2,000.00 or $2,500.00 on his word.

(Q.) Did the conditions set forth in that report, as far as you know, change during the next twenty months?

(A.) Only from knowledge I had of him saying it was the best he had seen; that is all I know anything about conditions changing.

(Q.) The physical conditions didn't change as far as you know, they were just the same twenty months afterwards as they were on November 6, 1918?

(A.) I suppose so.

The WITNESS.—(Continuing.) [114] Referring to the financial statement mentioned in the November 6th report, and the statement therein to the effect that the company was $200.00 in debt, I don't just recall that period. The last financial

(Testimony of C. A. Terwilliger.)

report that I had in mind was that there was about nine hundred dollars in the treasury, something like that; that was the only financial statement that I have in mind now, this other may have been later, that is, I may not have given it my close attention and hadn't it committed to memory. I don't think that I got the report showing nine hundred dollars. I think that Mr. Dunfee told when I was there in 1918 they had nine hundred dollars. That was pretty nearly three months before the lease shut down; when Mr. Dunfee said they had nine hundred dollars in the treasury I don't know whether they had money coming from Mr. Brady or not. (Witness is shown what purports to be the financial report mentioned in the report of November 6th, 1918.) It shows the company was in debt $200.00, that the company had 400,000 shares of treasury stock, and the last share of treasury stock I sold I sold at 50¢ a share, and no attempt had ever been made to make disposition or give me an opportunity to associate myself with anyone to use a share of that treasury in financing this company. I think that Dunfee had a salary of $150.00 a month as manager. I think his expenses were paid on his car. As to whether there was money in the treasury after November 6th to pay his salary, I imagine that there was no money in the treasury, but there was four hundred thousand shares of treasury stock and I was ready at any time to do my part and help dispose of them, and place it in the treasury.

(Testimony of C. A. Terwilliger.)

(Q.) Now take the complaint, Mr. Terwilliger, and turn to page 8. (A.) All right.

(Q.) At the bottom of Paragraph 8: (Reads:) "And in truth and in fact the mine showing continued to improve so [115] that in March, 1920"—notice that is about eighteen months after you closed down—"the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee." Is that a fact?

(A.) That was the intelligence that he gave me on the property when he conferred with me by letter, that it was the best property that he had seen, and the chances were better there than any place; he had been all over the state, and that the chances were better on the Orleans property than any place he had been; that was the intelligence I received, my last communication through letter from Mr. Dunfee was that it was the best property in his opinion that he had seen; I based every bit of my confidence in this property on Mr. Dunfee's judgment at all times; my personal judgment on this property was never instrumental in my financing this property at all, it was Mr. Dunfee's.

(Q.) Was it a fact that the mine's showing continued to improve, so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously?

(A.) We had done a great deal of development work there, the Orleans Mining and Milling Company had.

(Testimony of C. A. Terwilliger.)

(Q.) Answer the question; is it a fact?

(A.) I can only answer that by the intelligence he gave me in 1918, that it was the best property.

(Q.) He didn't write you the mine was improving?

(A.) He wrote me the chances were better there than any other place he had been.

(Q.) Did he tell you the mine was improving? Haven't you told the Court you knew the mine was idle for twenty months? (A.) Beg pardon?

(Q.) Haven't you told the Court you knew the mine was idle for twenty months?

(A.) Idle for twenty months? [116]

(Q.) Up to the time of the expiration of the lease? (A.) Yes, I think I made that statement.

(Q.) Well, is it a fact that the mine's showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously?

(A.) Well, I base my—

(Q.) Well, is it a fact?

(A.) It must be a fact; Mr. Dunfee advised me that the chances were better there than any place he had been, and I based my opinion on Mr. Dunfee's judgment of the property, and if I had raised any more money it would have been entirely on Mr. Dunfee's judgment of the property. That was the intelligence I received from Mr. Dunfee, that it was the best property he had seen, and he had looked over all of it, and that the chances were better there for a paying mine than any place that he had been.

(Testimony of C. A. Terwilliger.)

The WITNESS.—(Continuing.) I have a letter from Mr. Dunfee dated January 31, 1918.

(The letter is admitted in evidence without objection and marked Defendant's Exhibit "C" and the same, together with the envelope, is as follows:)

DEFENDANT'S EXHIBIT "C."

"Goldfield, Nevada, January 31st, 1919.

Mr. C. A. Terwilliger,

Brawley, California.

Dear Sir:—

Will say all you have to do is to look at your reports I sent you, and you will find out just what the Orleans M. & M. Co. Received for ores shipped, and also money expended. I have all checks and returns for the ore in the office here, which it would be a pleasure for me to show the stockholders.

As to standing between me and the stockholders, you don't have to, as it was your own personal stock you sold them. You set the price and gave them 32,000 shares for $8000.00 to fulfill [117] your contract with me, and kept 268,000 shares for yourself which did not cost you a cent. Nothing would I like better than to meet all of your stockholders and explain this to them. What you are driving at in your letter is a mystery to me. You were always going to do great things for the Orleans M. & M. Co., but I realized on account of the war that nothing could be done.

The mill closed down, and have taken up a part of their pipe line, and it is hard to raise money for

(Testimony of C. A. Terwilliger.)

Hornsilver, as she has a black eye, and we were merely operating under a lease as you were aware of.

If you have any suggestions to make let me hear from you, as you always represented that you could finance it. That was your part of the agreement. Further you ordered the mine closed in an indignant way, so it is up to you to start it, and my report covers the true conditions of the mine.

Yours very truly,

J. W. DUNFEE."

(Envelope:)

Orleans M. & M. Company, (Stamp 3¢)
J. W. Dunfee, Manager.
Hornsilver, Nevada.

(Goldfield)
(Feb. 1)
(6 AM.)
(1918)
(Nev.)

Mr. C. A. Terwilliger,
Brawley,
California.

(Imperial Valley)

(In pencil: Ansd. 2/18)

The WITNESS.—(Continuing.) I have the letter of September 14, 1918, referred to in Defendant's Exhibit "C."

(Witness produces letter, identifies same and the same marked Exhibit "D" is admitted in evidence without objection and is as follows:)

DEFENDANT'S EXHIBIT "D."

J. W. DUNFEE,
President and General Manager.
C. A. TERWILLIGER,
Vice-President. [118]
ORLEANS M. AND M. COMPANY.
Mines: Hornsilver, Nevada.

Sept 14 1918

Friend Cal

Received your letter today Will say in regard to your letter at the time Mr. Brady was to treat our ore for 5.00 per ton and also miners wages was $4.00 ware conditions changed every thing miners get 5.00 and 5.50 milling charg went to $6.50 and there never been any profits made up to date made. It true we have had a few hundred on hands at times but the way Brady paid us never had a full months pay roll ahead You was here and remember it well Now I am pulling up again and will close dow if mill shuts down the 20 of this month and if there any money left if you say so we allow him his money on the account of his circumstances only if it can be legaly allowed the mining is killed in this state on the account of the war We try pull things through. I drifting east on vein in hope of getting a shiping ore shoot thing looks good for a shiping shoot condition about the same as it was on the 350 level before we got that rich shoot that you sampled the first time you sampled the mine if we close down you and I will try outline a plan of action

Yours Truly
J. W. DUNFEE."

(Testimony of C. A. Terwilliger.)

The WITNESS—(Continuing.) I claim that for eight thousand dollars ($8,000.00) I paid to Mr. Dunfee I have a fifty per cent interest in anything that he might acquire in the indefinite future on the Orleans property; that is my idea. After the organization of the corporation the promotion stock was divided between him and me. I got 300,000 shares. I disposed of some 32,000 of my share in Imperial Valley, by which I received this $8,000.00 and paid it over to Mr. Dunfee. Mr. Dunfee paid $5,000.00 of that [119] into the treasury for corporate purposes, used it for the development of the mine. Of the balance of three thousand I myself drew a $1,000.00 for organization, trips and all my expenses combined. I got it later on, I don't know what it came out of; it could not have come out of the three, because he wasn't paying me out of the three that he was to take; that specifically set out that Mr. Dunfee was to receive three thousand dollars in cash, and I was to receive no part of that at all. I received the money after we were going, at intervals, and it was allowed and approved by Mr. Dunfee, and I received my expenses and things of that kind, for organization and such as that, but not any understanding of mine that I ever received a dollar out of the three thousand; that was definitely understood by me that Mr. Dunfee got that money, that that was his money. I am just estimating the amount around a thousand dollars. That was for different trips and expenses, and things of that kind, incurred by me coming up.

(Testimony of C. A. Terwilliger.)

When I came up there for the company I was allowed for, I think I was allowed on this trip I came up to Reno with Mr. Edwards, a certain amount of money. I took the trip to Reno because Mr. Dunfee was at the mine and busy, and I was there at the time, and he says, "You can make that trip up to Reno just as well as I can with Judge (Edwards). I am busy and can't go, and I wish you would go up there with him." I came to see Mr. Brady, who owed us money that Mr. Dunfee was trying to collect. Mr. Edwards came up with me. He was secretary of the company. I have nothing to do with the managing of the company, and I don't know whether he was the attorney for the company or not; Mr. Dunfee knows that. As to the necessity of my accompanying Mr. Edwards, it was simply a mutual agreement, and Mr. Dunfee's suggestion. I don't exactly remember, but it seems to me that I was at Hornsilver during that time possibly a week or two weeks; it might have been three weeks. I made this trip, one trip that I [120] speak of, in the interests of the company. I was around there with Mr. Dunfee; I wasn't on the payroll; I wasn't drawing any salary. I was drawing expenses while I was there assaying, paying my board, and I presume my expenses came out of that, and I considered the interest of myself, the stockholders of the company; I made the trip to Reno in the interest of Mr. Dunfee and the company in general. I think I went down the mine with Mr. Dunfee while there that time, I am not sure. I

(Testimony of C. A. Terwilliger.)

suppose I have been in the mine maybe three or four times, not often, because I wasn't the manager of the mine, and I based most all of my judgment entirely on the property thru Mr. Dunfee's opinion; he had had the property for years, and I went down and looked it over when he wanted to show me things; I was down in the mine I think it was three or four times. I know something about practical mining. I know how to catch up ground, and protect the mine, and do general mining, and raising and stoping and sinking, and almost everything there is about mining, running a hoist and those things. I myself mined for a number of years.

The following letter was identified by the witness as having been written and signed by him and forwarded to the addressees therein named, admitted in evidence and marked Defendant's Exhibit "E," to wit:

DEFENDANT'S EXHIBIT "E."

"Santa Ana–Aug–30–1917.

Mr. Carter Edwards and Dunfee.

Dear Sir:

I am in receipt of a letter from Dunfee which I infer you know the contents. It is not the listing of the stock that I am in such a hurry about, but the permit to sell stock which we get through Sacramento. I will enclose here a cancellation of any and all indebtedness of mine against the company and when I go to Brawley where the agreement is I will send in the original agreement [121] can-

(Testimony of C. A. Terwilliger.)

celled. Now I am waiting here to get this permit and it has nothing to do with the listing of the stock, that is a different matter and will come later. The principal thing right now is to be able to sell stock, so we can keep money in the treasury, as our funds will soon be exhausted. Will you please telephone Will and have him come up and get these papers for getting the permit to me as soon as possible. I assure you both I am of the same opinion in regard to being fair with the public, and want the company clear and free from debt before any stock is sold. Now it will be clear of all indebtedness upon receipt of this letter as far as I am concerned, so it up to Will to do likewise. Now please attend to this at once, so I can go on with the work. With kindest regards to you both,

Yours truly,

C. A. TERWILLIGER.

(Q.) What was your anxiety to sell stock if you considered that the payment of eight thousand dollars ($8,000.00) absolved you from any further obligation from the company?

(A.) I didn't consider that, that I had no obligation whatever; I was interested in this property; I was fifty-fifty with Mr. Dunfee, and naturally I wanted to help to finance it, and that was my idea for getting the permit to sell the stock and finance the property.

(Q.) Did you contemplate selling treasury stock?

(A.) That is what I figured on at that time.

(Q.) You recall that this contract of yours pro-

(Testimony of C. A. Terwilliger.)

vides that any future stock sales shall be made from your holdings and Mr. Dunfee's holdings, don't you?

(A.) That never was discussed after we started in, that is in anywise that I remember; it is in the contract.

(Q.) The provision is as follows: "It is further agreed that should it be deemed advisable after the full eight thousand dollars is raised to raise more money for development, [122] the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger respectively." You abandoned that idea, did you?

(A.) At that time that never entered my mind.

(Q.) Did you abandon that idea?

(A.) That idea never entered my mind when I wrote that letter.

(Q.) You never had any idea then of selling your own promotion stock?

(A.) At that time when I wrote that letter, no.

(Q.) You have been telling the Court about the 400,000 shares that were in the treasury, by which the company could be carried along; your idea that that 400,000 shares could carry the company had to do with your abandonment of this provision that I have just read to you, had it?

(A.) No, sir; I didn't look at it that way at all.

(Q.) Were you operating under the theory that you would dispose of the treasury stock, or under the theory that you would act under this contract?

(A.) I was not manager of the property, and Mr. Dunfee had never submitted to me that he and I

(Testimony of C. A. Terwilliger.)

would sell that stock as it was agreed upon in the contract.

The WITNESS.—(Continuing.) I sold 200 shares of the treasury stock to John Winkler. I did not turn that money into the treasury. That money was allowed me on my expenses. Mr. Dunfee knew about it, and it applied on my expenses, and it was approved. I do not know whether that was included in that thousand dollars or not. Mr. Dunfee said that was all right; he knew about it when I sold this stock to Mr. Winkler. I do not know whether or not that was within the thousand dollars, [123] or in excess of the thousand dollars. I think that was while I was in Hornsilver in April, 1918. It was on the book that Mr. Edwards issued the stock. I don't know whether or not I at that time knew how much the company was indebted to Mr. Dunfee. I don't know whether I had any written knowledge. I think he mentioned that in a letter; I didn't keep the books. I believe that I have a letter from him to the effect that he was advancing money. It might have been discussed between us; he may have mentioned it and talked it over to me, but I don't just recall but I think it is written in a letter. I never told him I would oppose the return of that money to him.

(Q.) During that trip in Hornsilver did you have a conversation with Mr. Dunfee with reference to his giving you some of his stock?

(A.) Mr. Dunfee and I talked, were talking over something about the property one time, and when-

(Testimony of C. A. Terwilliger.)

ever we talked over the property, about the arranging of the different plan to raise money, or anything of that kind, I always said that I figured I had already paid for what I had gotten in the company in my contract so far, and that any arrangement we made that I would have to have some consideration, that was it.

(Q.) What kind of consideration?

(A.) Well, I don't just exactly know what it was; I don't know just what the consideration was.

(Q.) You didn't discuss it?

(A.) I could not say as to what it was.

(Q.) You don't know whether it was to be money or something else? (A.) I—

(Q.) Didn't you—

Mr. FRENCH.—Let the witness finish his answer. [124]

Mr. TILDEN.—Yes, he ought to be willing to answer.

Mr. FRENCH.—Finish your answer, if you haven't.

(A.) *Mr.* answer?

Mr. TILDEN.—(Q.) Mr. Terwilliger, you told Mr. Dunfee you would not attempt to further finance this company unless he would come through with the hundred thousand shares of his stock, didn't you? (A.) Never; never.

(Q.) How many shares?

(A.) Never; never was mentioned.

(Q.) Well, what was this consideration?

(Testimony of C. A. Terwilliger.)

(A.) I don't know as we ever in our lives discussed any consideration to any point.

(Q.) Tell the Court what the consideration could have been except money or his stock.

(A.) There was never a definite thing about consideration at any time.

(Q.) Well, tell the Court how you used that word consideration?

(A.) In talking with Mr. Dunfee, you mean?

(Q.) Yes.

(A.) I can't tell the Court anything further than I have, that there was no consideration; there was nothing definite, there was never anything of that kind, that is when we did talk it over; one time I got up and left Mr. Dunfee because Mr. Dunfee became angry with me, and I walked down the gulch about two hundred feet, and finally he came on down, and sat down and gave me an awful good talking to, that I remember.

(Q.) Tell the Court about that.

(A.) He said that I was trying to "gyp" or something of that kind.

The COURT.—Said what? [125]

(A.) He said I was trying to gyp him.

Mr. TILDEN.—(Q.) Why did he say that? What does "gyp" mean?

(A.) Well, it is a slang phrase for trying to get the best of him, or something.

(Q.) Tell the Court what happened at that time.

(A.) At that time we were talking back and forth there, there had never been any consideration arrived at, or anything of the kind.

(Testimony of C. A. Terwilliger.)

(Q.) Don't you know why Mr. Dunfee accused you of trying to gyp him?

(A.) No, sir; we were talking business pure and simple, and it was nothing else.

(Q.) What business?

(A.) We were exchanging ideas, that is all, we were not coming to any definite understanding, or anything of that kind; we were simply in a conversational way talking over the properties; that is exactly the way we were talking.

(Q.) Didn't you tell him at that time you would oppose his drawing that $2,100 unless he paid you some stock? (A.) No, sir.

(Q.) And didn't you tell him also you would oppose the payment of that $2,100 unless he would go to Mr. Edwards and try to get a further extension of the lease? (A.) No, sir.

(Q.) And wasn't that the reason for his writing you this short telegram: "You or your stockholders can get no extension of lease or option; don't come up to talk to me, am through with you"?

(A.) No, sir.

(Q.) That is not the reason? (A.) No, sir. [126]

(Q.) And you can't give any other reason for that telegram, can you?

(A.) I have already given you two telegrams yesterday; that telegram was May 30th, wasn't it? Pardon me, what date is that telegram?

(Q.) May 31st, 1918.

(Testimony of C. A. Terwilliger.)

(A.) That telegram was in answer to other telegrams that are in evidence.

Mr. TILDEN.—We offer that in evidence.

(The telegram is admitted in evidence, marked Defendant's Exhibit "F," and reads as follows:)

DEFENDANT'S EXHIBIT "F."

"WESTERN UNION TELEGRAM.

Received at 150 GS U 23.

Goldfield Nev 444 PM May 31st 1918

C. E. Terwilliger

Brawley Calif

You or your stockholders can get no extention of lease or option don't come up to talk to me am through with you.

DUNFEE."

Mr. TILDEN.—(Q.) Now notwithstanding that telegram that I have just read to you, Defendant's Exhibit "F," you and Mr. Dunfee got together again and became perfectly friendly, didn't you, within a month after that?

(A.) Within an hour after that, within less time possibly.

(Q.) No, I mean after that telegram.

(A.) Oh, I beg your pardon. I thought you meant after this other. Yes, sir, after that telegram, that was explained to me, Mr. Dunfee explained the whole thing, and apologized for the telegram, and everything of the kind, and it was perfectly satisfactory.

(Q.) When did he apologize for that telegram?

(Testimony of C. A. Terwilliger.)

(A.) Well, sir, I think it was when we were in Goldfield, 1918, around August 1st or 2d, Mr. Dunfee said he had had an awful time with his tonsils, that he had had neuritis and was almost crazy, and he had had his tonsils removed and—

(Q.) Well, the explanation was perfectly satisfactory?

(*Q.*) Yes, sir, it was perfectly satisfactory, and I had no feeling towards him whatever.

The WITNESS.—(Continuing.) I remember receiving a letter in which Mr. Dunfee made reference to what Mrs. Dunfee had told him that I had said to her.

(Letter identified by the witness, admitted in evidence without objection, together with memorandum at top of same, all marked Defendant's Exhibit "G," and is as follows:)

DEFENDANT'S EXHIBIT "G."

(Note: Dunfee was in L. A. in July and purposely did not let C. T. Know it or see him.)

J. W. DUNFEE,
President.

J. C. CANNAN,
Secretary.

HASBROUCH DIVIDE MINING COMPANY.
Mines in the Divide District.
Goldfield, Nevada, April 12, 1919.

C. A. Terwilliger
Brawley Calif

As you gave me my orders what to do in regard to Orleas I closed and paid up bills then when

(Testimony of C. A. Terwilliger.)

your threatening letters came I proceeded to have and expert accountant to go over thing at more cost to me. I had worked this prospect so concensous that it had broke my health over worrying our lease has been closed now six months and I'll *excet* your conversation with Mrs. Dunfee as your true feeling toward me. it be impossible for me to meet you in La. Angeles as I am interested in three Co. in Divide District which is on the curb in New York that keeps me here till some time this summer I have nothing but friendly feeling for you and be glad to talk to you on business matters. [128]

Yours Truly

J. W. DUNFEE.

(Envelope:)

Hasbrouck Divide Mining Company, (Stamp 3¢)
Goldfield, Nevada.

(Goldfield)
(Apr 13)
(6 AM.)
(1919)
(Nevada)
C. A. Terwilliger,
Brawley,
Calif.

The WITNESS.—(Continuing.) I have known Mrs. Dunfee since about 1907. I live within five or six or maybe eight blocks of her in Los Angeles. I never found that out until this morning, that is, where she is living this time. I have been at various times

(Testimony of C. A. Terwilliger.)

in communication with her over the telephone since I think 1918. I have lived in Los Angeles since about 1911 or 1912, I think. I have known for a number of years that Mrs. Dunfee was in Los Angeles; I can't give you the exact date, but I knew she made her home there, and she was there most of the time, and I have phoned her, she or her mother, at various times, when they were living on the north side. That has been when I was trying to locate Mr. Dunfee at various times, ask if he was down, or knew when he would be down. I would say that was in 1919 and 1920. My reason to suppose Mrs. Dunfee would be able to inform me was, I thought she knew when Mr. Dunfee came down, and I heard that he was in Los Angeles about in 1919 and 1920, and he never saw me; he knew where I lived, knew my address, and I naturally expected to see him and wanted to see him. The fact is that I knew Mr. and Mrs. Dunfee was in communication, and my opinion was that when Mr. Dunfee came to Los Angeles he called on Mrs. Dunfee. Referring to the letter last admitted in evidence, I think I have had some conversation with her at the time she referred to, that I might have said something while I was in an angry way. I don't know what [129] I said. I did not say anything to the effect that if Mr. Dunfee came to Los Angeles I would have him put in the pen or to the effect that if he came to Los Angeles I would have his automobile seized. I never said anything like that to her at all. The contract that I set up in the complaint was drafted

(Testimony of C. A. Terwilliger.)

by Mr. Dunfee and myself. Mrs. Terwilliger put it into writing at Mr. Dunfee's suggestion and mine, just us three together. Mr. Dunfee said he didn't want to be represented by a lawyer at that time. I suggested taking it to a lawyer and he said that he didn't want to go to a lawyer. I said I had an attorney that had done business for me fifteen years or so, and I said, "We will go over there and he will fix up a contract"; and Mr. Dunfee says, "No, we can fix it up among ourselves," and I think Mrs. Dunfee knew Mrs. Terwilliger had a great deal of experience as a stenographer and such as that. I said, "Well, Mrs. Terwilliger can use the typewriter," and she went out and took this contract you have reference to and came back with it made, and I don't think there was a change made in it by Mr. Dunfee or myself. The last two communications between me and Mr. Dunfee were March 26, 1920, by Mr. Dunfee and May 2, 1920, by myself. At the time I wrote the May 2d letter I knew the lease would expire in some thirty days, unless it had been renewed or something; I knew that was the time it would run. I had the notice of that.

Mr. TILDEN.—(Q.) From the date of expiration of that lease until you discovered the facts of this lease, or the facts on which you base your complaint, was another thirteen months, wasn't it?

(A.) I just didn't get that.

(Q.) I will have it read. (The reporter reads the question.)

(Testimony of C. A. Terwilliger.)

(A.) Yes, sir, it was I think in the light of 1921. [130]

(Q.) What interest were you taking in the Orleans property in that thirteen months?

(A.) Well, I had never received any communication from Mr. Dunfee.

(Q.) What interest were you taking in the property?

(A.) Well, I was just—I can't say I was taking any interest, that is, in the way of operating, or active in any way.

(Q.) What interest were you taking in the property?

(A.) Well, I wasn't doing anything; I don't think I wrote any more letters, or sent any more letters during that time; I thought I would eventually hear something from Mr. Dunfee, that is the way it stood; I hadn't heard anything.

(Q.) What made you think you would hear anything from him?

(A.) Because I was fifty-fifty in the property.

(Q.) On that expired contract?

(A.) Yes, and he never got no extension, and never did anything of the kind, then my interest stopped there, also my stockholders, and they understood it that way; Mr. Dunfee let that go by the board, and never got it again; I was out, I took it absolutely upon his assurance that he could get it.

(Q.) Your idea was if he ever in the future got an interest in the Orleans, then you would spring your fifty-fifty interest on him? (A.) Yes, sir.

(Testimony of C. A. Terwilliger.)

(Q.) And in the meantime you would do what you did do, nothing? (A.) Beg pardon?

(Q.) And in the meantime you would do what you did do, namely, nothing?

(A.) I could not do anything because I tried before the lease expired with no results; I could not get Mr. Dunfee to [131] see me, he was in Los Angeles twice.

(Q.) Did you write Mr. Dunfee to come to Los Angeles to see you until the company ran out of funds?

(A.) I think before that, when we were mining right along, and getting good ore; I think I have the letters here to refer to right now.

(Q.) Answer the question first.

(A.) That is written evidence and I can refer to it; that is the only way I can tell you the date.

(Q.) The fact is you never hesitated to come to Nevada on the business of the lease so long as the company had money to pay your expenses; is not that it? (A.) No, sir.

(Q.) And when the company ran out of money to pay your expenses then you tried to compel Mr. Dunfee to come to Los Angeles to see you?

(A.) No, sir; there is several hundred dollars now that I paid out coming up here that has not been taken care of, and I never said anything about it.

(Q.) How many trips?

(A.) This last trip was one.

(Q.) This present trip?

(Testimony of C. A. Terwilliger.)

(A.) No, the one I made in 1918, has *been* been covered, any of them at all.

(Q.) How many trips did you make to Nevada?

(A.) I think it was three or four.

(Q.) And the thousand dollars would not cover it?

(A.) I say this last trip hasn't been reimbursed.

(Q.) Did you receive a letter from Mr. Dunfee in 1920, in which he said, "You know as well as I do we have to do sixty shifts a month"?

(A.) I don't remember that letter. [132]

(Q.) Well, did you or did you not receive such a letter?

(A.) I don't remember of having received such a letter, where he said you know as well as I do we have to do sixty shifts a month; I don't remember of ever receiving that letter, I don't think I did.

(Q.) When he wrote you that he could get a lease for two and a half years if you and he could get together on it, you understood that was in contemplation of the present lease running out, didn't you?

(A.) Well, I—

(Q.) Did you not understand that?

(A.) Well, in my mind it would be a renewal, that we had discussed before.

The WITNESS.—(Continuing.) I think the regular meeting day of the board of directors of the Orleans Company was the 24th or 25th of June. I attended to the organization of the company in Arizona; it was turned over to the Stoddard Incorporating Company of Los Angeles, with offices in the

(Testimony of C. A. Terwilliger.)

Van Nuys Building. I think it is a branch office of the Phoenix, Arizona, incorporating company. I think the Phoenix company held the organization meetings for the first year. I think it adopted the by-laws. I think I notified Dunfee to turn all papers to E. Carter Edwards, secretary of the company. I think the charter was sent to me and I sent it and the papers; all of them that were ever returned to me I think were sent to Mr. Edwards. I don't know as I examined them in detail. I think I read the by-laws to some extent, but haven't them committed to memory.

(Q.) Well, you know that the regular meeting day of the board of directors is the first Monday in June, September, December and March, don't you?

(A.) Well, I could not swear to it. [133]

The WITNESS.—(Continuing.) At any rate, after the mine closed down I never attempted to attend a meeting. I was away, and they had their board of directors in Goldfield for that purpose, for doing business without me being present, that was understood when the three directors went in there; I was down there a long ways from them.

(Q.) Is that true also with respect to stockholders' meetings?

(A.) Well, I think we had stockholders' meetings in Los Angeles a couple of times, Mr. Dunfee and myself.

(Q.) You don't mean a couple of times, do you?

(A.) I don't know how many times it was. Once I believe I had in mind.

(Testimony of C. A. Terwilliger.)

(Q.) Did you know how many shares of stock could demand a special stockholders' meeting?

(A.) I don't know that I knew exactly.

(Q.) Well, I will read this to you and possibly it will refresh your recollection.

Mr. FRENCH.—If the Court please, I don't want to make any technical objection, and I am perfectly willing if those are the original by-laws to accept them, but I do object to cross-examination on a piece of paper when we don't know what it is.

Mr. TILDEN.—They purport to be the original documents from the Phoenix office.

The COURT.—Hand them to counsel and see if he has any objection.

(A short recess is taken at this time.)

Mr. FRENCH.—If the Court, please, regarding these by-laws, if counsel assures me these are the only by-laws, I will withdraw the objection, but I cannot tell whether they are or not, they have not been identified.

Mr. TILDEN.—On the assurance of Mr. Edwards, the [134] secretary, I assure counsel they are the by-laws.

Mr. FRENCH.—We will withdraw the objection.

Mr. TILDEN.—(Q.) Did you know that under the by-laws any one owning a fourth of the outstanding stock could demand a special stockholders' meeting? A. No.

(Q.) You never did demand one, did you?

(A.) I don't think I ever did.

(Q.) Why do you say you don't think so?

(Testimony of C. A. Terwilliger.)

(A.) No; no, I never demanded one.

(Q.) You know the annual meeting, the regular annual meeting is held on the 25th of June of every year, when it is held; that is, that is the date provided for its holding?

(A.) I think that is what we agreed upon.

(Q.) Do you recall at one stockholders' meeting that was held at Los Angeles a resolution was passed that all future meetings should be held at Los Angeles? A. At Los Angeles?

(Q.) Yes, future stockholders' meetings.

(A.) It seems to me as though that is in my mind.

(Q.) You have seen the minutes, have you not?

(A.) The minutes of that meeting we had in Los Angeles?

(Q.) Did you ever look at the minute-book?

(A.) I don't think I have seen the minutes of that meeting we had in Los Angeles.

(Q.) You don't think so?

(A.) I might have seen them.

Mr. TILDEN.—I will make the same assurances about these minutes.

Mr. FRENCH.—Very well.

Mr. TILDEN.—(Q.) And I call your attention to what purports to be the minutes of the stockholders' meeting held in Los Angeles, August 14, 1917, and ask you if you ever remember seeing them?

(A.) No, I don't remember ever seeing those. [135]

(Q.) Did you attend this meeting?

(Testimony of C. A. Terwilliger.)

(A.) I think I did.

(Q.) Are you uncertain about it?

(A.) I think that was the date we held the meeting in 1917, I think.

(Q.) Whatever the date was did you attend the meeting? (A.) I attended that meeting.

(Q.) Do you recall whether or not a resolution was passed to this effect? It was duly moved and seconded that hereafter the annual stockholders' meeting be held in Los Angeles; the motion was put and carried unanimously; do you remember that that occurred?

(A.) My mind is not fresh on it, but it seems to me there was something to that effect.

(Q.) You were interested to have the meetings held in Los Angeles, weren't you?

(A.) Well, the stockholders all being down there, I was.

(Q.) Now during any of this period after the mines were shut down, were any regular meetings of the stockholders held?

(A.) I didn't understand you. (The reporter reads the question.)

(A.) I don't think so.

(Q.) Why do you say you don't think so?

(A.) Well, I can't remember of any being held, I don't think there were.

(Q.) Do you think it is liable any would have been held without your remembering it?

(A.) Well, I don't think I have attended any.

(Q.) Do you know of any having been held?

(Testimony of C. A. Terwilliger.)

(A.) No.

WITNESS.—(Continuing.) It was my understanding that after the mines shut down the mine conditions were worse in the respect that the Brady mill was about to cease operation. With [136] the cessation of operations by the Brady mill it was necessary then to haul the ore sixteen miles, and from that point ship it to Tonopah. That called for a higher grade of commercial ore than tho the mill were running.

(Q.) In your complaint you charge Mr. Dunfee with practicing concealment; what concealment did he practice?

(A.) Well, I understood that he was in Los Angeles a couple of times, I was given information, and I never saw him, and I wanted to meet him there; I had a letter and he said he was sorry that he could not meet me in Los Angeles, and I knew nothing of this transaction after the time it took place until in July, 1921; there was a number of months you mentioned this morning, thirteen or fifteen months, or whatever it was, that I knew nothing about it; I was interested with him and put up money—

(Q.) You are talking about the period after the lease expired?

(A.) Well, and during the time it run, up to 1920; he was in Los Angeles I think two different times, and never saw me.

(Q.) Was that the only concealment that he practiced?

(Testimony of C. A. Terwilliger.)

(A.) Well, I knew nothing about the operation. I had no letters, no answers to my letters up until the time that I got a letter in 1920; I had been in correspondence with him more or less all the time.

(Q.) Is not this your idea, Mr. Terwilliger, that because he didn't communicate with you, he was practicing concealment?

(A.) As far as my having any information in regard to his—

(Q.) Answer the question.

Mr. FRENCH.—He is answering it. [137]

Mr. TILDEN.—(Q.) Is that your idea, that because he didn't communicate with you he was practicing concealment?

(A.) Because I didn't hear anything from him, that is what I based my opinion on; yes, sir.

(Q.) That situation began on March 26th, 1920, didn't it?

(A.) No, before that; I had written to him in 1919.

(Q.) Well, when you last heard from him on March 26th, 1920? (A.) Well, yes, it had—

(Q.) Then this concealment commenced March 26th, 1920?

(A.) No, sir, in 1919; he was in Los Angeles, and I never saw him at all; I was in Los Angeles I think at that time.

(Q.) Try to follow me, Mr. Terwilliger. You say that because he didn't communicate with you he was concealing things from you; now he did communicate with you up to March 26th, 1920?

(Testimony of C. A. Terwilliger.)

(A.) There was a lapse of time between that time that I never heard from him.

(Q.) Don't you understand what I am driving at?

Mr. FRENCH.—I think the witness is answering; he says there was a lapse of time between, and he was trying to explain and then the interruption came.

The COURT.—Ask the question again.

Mr. TILDEN.—I will put the question again. (Q.) He did communicate up to March 26th, didn't he, so if there was any concealment before that it was broken then; up to March 26th, 1920, there was communication between you from time to time.

(A.) I can't say that unless I can refer to letters there, and find them, I don't know what the correspondence will show.

(Q.) Well, after March 26th there wasn't any communication between you and him, was there? [138]

(A.) I don't think I received another letter from him after that time.

(Q. And you didn't write him any letters after that time, did you?

(A.) I don't remember that I did.

(Q.) Won't you answer that categorically, yes or no?

(A.) As my mind serves me, no, I didn't write him after that, I don't think.

(Q.) When did you begin to suspect after March 26th, 1920, that he was concealing things from you?

(Testimony of C. A. Terwilliger.)

(A.) Well, I didn't begin to suspect it after that time, it was before that, that I didn't get into communication with him in anywise that I began to feel, that is, that I wasn't getting any intelligence on the property either one way or the other, that was before that time. After that time, and after the lease ran to a certain time and expired, why I didn't know what position the property would be in, only through what he would do, that is all, I had no way of—I had never got a lease, never got an extension, never communicated with the French Company, didn't know any of them, didn't know their address, so I could only wait and abide my time until I heard something from Mr. Dunfee, that is the way I felt about it.

(Q.) Did you have any anxiety about the property after March 26th?

(A.) At all times I had my interest in my mind.

(Q.) You know the difference between anxiety and interest, don't you?

(A.) I had had anxiety all along up to 1920, and I had written and written, and received no answers to my letters, and one letter was returned, and I had more or less become so I didn't believe I could get results by writing, that I would have to see Mr. Dunfee, that he would have to come and see me, and that we [139] would get together eventually.

(Q.) Did you make any efforts to raise any money after March 26th, 1920? (A.) No, sir.

(Testimony of C. A. Terwilliger.)

(Q.) Did you make any efforts to raise any money after the mine closed down?

(A.) I made all kinds of efforts to get together—

(Q.) Answer the question.

(A.) Yes, sir, I did; in a letter there. It is in letter form; I can show you.

(Q.) I don't want the letter. I want you to tell me whether you made any efforts to raise money.

(A.) Yes, sir, I made an effort to get in conference with Mr. Dunfee so we could formulate a plan to raise money for that sole purpose.

(Q.) Did you make an effort to raise money on any plan you had used before?

(A.) Not at that time; we would get together and formulate a plan, that was my understanding the last time we talked about it.

The WITNESS.—(Continuing.) I had different conferences with Mrs. Dunfee. I don't remember the dates of the conferences. I don't think that I saw her after the lease expired. I cannot say whether I did or did not see her in the fall of 1920; I don't know; I might have seen her. I don't remember whether or not I met her on the street as she was about to get on a street-car in Los Angeles. I met her one time on the street in Los Angeles, but I don't know whether it was in 1919 or 1920, or 1918; I know that I met her for just a few minutes; she was going up the street.

(Q.) Did you not on Broadway, near Eighth, in Los [140] Angeles in September, 1920, meet Mrs.

(Testimony of C. A. Terwilliger.)

Dunfee and speak with her about Mr. Dunfee's operations in the Orleans?

(A.) I don't remember that meeting in 1920, in September, 1920.

(Q.) Did you ever at any meeting with her speak to her about Mr. Dunfee's operations on the Orleans, and with respect to one Harry McMahon?

(A.) Never; never remember mentioning Harry McMahon.

(Q.) You don't propose to say that you didn't mention him, do you?

(A.) I say I never mentioned him that I know of; never.

(Q.) Did you ever hear of Harry McMahon?

(A.) I can't recall who he is now.

(Q.) Did you ever hear of him?

(A.) I don't know; I can't place him; can't tell who he is, Harry McMahon; would not know him if he was brought in here; could not identify him; don't know him; don't know who he is connected with; don't know him.

(Q.) Did you ever hear of a mining man named Harry McMahon? (A.) McMillan?

(Q.) McMahon?

(A.) No, sir; can't place the man at all.

(Q.) Didn't you say in effect to Mrs. Dunfee, at that time, you understood that Mr. Dunfee was dealing with Harry McMahon, or with McMahon on the Orleans? (A.) No, sir.

(Q.) And that if he sold the Orleans you would put him in the pen, or something of that sort?

(Testimony of C. A. Terwilliger.)

(A.) No, sir.

The WITNESS.—(Continuing.) I never heard of Gordon Bettles; never heard of Mr. Dunfee's dealing with Gordon Bettles with respect to the Orleans. I have heard of the Tonopah Mining Company but never heard of Dunfee's dealing with them with respect [141] to the Oreleans; never heard of it in Los Angeles. I heard of it in Tonopah; that was in 1921, the latter part of July. That is the time I first heard of Mr. D'Arcy; that is, to recall who Mr. D'Arcy was; that is about the first time I had heard of Mr. D'Arcy. I know Wiliiam Sirbeck. I never heard of him in connection with the Orleans until I saw it in the answer in this case.

(Q.) In one of the letters that you read from Mr. Dunfee, do you recall that he said that he would keep your representative in Hornsilver advised?

(A.) My representative? I never had a representative here; never. I asked Mr. Dunfee for a job for that man, and he was given a job three months; that was the man, John Winkler.

(Q.) John Winkler?

(A.) Yes, sir, John Winkler.

(Q.) That is the man you sold the stock to?

(A.) Yes, sir.

(Q.) Do you recall that he made that reference in his letter to your representative in Hornsilver?

(A.) I believe that he said some place there that he would ask my man, he didn't say representative, he said my man John, to keep me posted, I think it was. I think that is it.

(Testimony of C. A. Terwilliger.)

(Q.) How long did Mr. Winkler stay in Hornsilver?

(A.) Three months, I think; he worked there three months, I think.

(Q.) Did you have him write you concerning Hornsilver while he was there?

(A.) He wrote me the letters; I think Mr. Dunfee gave him every bit of the intelligence he wrote me, I think; I think he referred to it in the letters, Mr. Dunfee telling thus or so, or he was out with the truck that was hauling ore up to the mill, and he would write me once in a while, I think.

(Q.) How many letters did he write you? [142]

(A.) Twelve or fifteen letters, I think.

(Q.) In the course of three months?

(A.) I imagine about that; might possibly be more.

(Q.) And that was in 1919? (A.) I think 1918.

(Q.) Until when?

(A.) Well, I think it was March, April, May, June, along there, I think it was; I think that is about the time he was there.

The WITNESS.—(Continuing.) I did not have anybody else in Hornsilver writing me. I did not take any newspapers from the southern part of the state, but I used to read the Goldfield papers and Reno papers quite often when I would be in Los Angeles; the "Goldfield Tribune," whatever the papers are there; I remember I read them once in a while, but I wasn't a subscriber to any Nevada paper. I would go to the news-stand and buy them

(Testimony of C. A. Terwilliger.)

once in a while. I didn't make a practice of it; Mr. Dunfee sent me several papers, at different times while the property was running. My idea in getting the Southern Nevada papers from the news-stand was that I was interested in Hornsilver, and I was also interested in the state, that is, in a general mining way, and I would get the papers and look them over. I can't tell you how long I continued to do that; there was no definite time, no practice established. I think it was about the middle of July, the 15th I will say, that I discovered the facts set forth in my complaint, in regard to the disposition of the property of the Orleans Mining and Milling Company. I met on the street a man by the name of John Duffy who lives at the Colonial Hotel in Los Angeles. I have known him a number of years and he also knew Mrs. Dunfee. We stood there and talked a few minutes, and he said, "You know Dunfee is selling the property." This man Duffy is a mining man at the present time at Randsburg, I think; I don't know anything about his business at all except that he is a miner. I have known him for seven or eight [143] years. I don't know whether or not he ever operated in Hornsilver. I don't know where he got his information. It was three or four days after that conversation that I came up to Nevada,—within a week anyway, I believe.

(Witness is shown copy of "Goldfield Tribune.")

(Q.) Do you recognize this as a copy of the "Goldfield Tribune"? (Hands to witness.)

(Testimony of C. A. Terwilliger.)

(A.) I want to see the date of it.

(Q.) You can't tell the "Tribune" by the date; just look at the top of it. (A.) Yes, sir.

(Q.) Do you remember a "Tribune" of March 26th, 1921?

(A.) I don't know as I read that; what is the date of it?

(Q.) March 26th, 1921?

(A.) No, I never saw that paper until afterwards; I never saw that paper at all until after this —until after I had met Mr. Duffy in Los Angeles.

(Q.) Then how did you come to see it?

(A.) Well, I think I got that paper somewhere. I don't know just exactly where I got it, but I got that paper.

(Q.) March 26th.

(A.) Yes, sometime I got that paper somewhere.

(Q.) Can you tell us whether you got it at the news-stand?

(A.) No, I can't tell you where I saw the paper first; I believe I read something to that effect. I don't know where I got the paper or anything.

(Q.) You read the article in it about Hornsilver?

(A.) I don't know that I read it in detail; I saw where Mr. Dunfee sells the property; isn't that the heading?

(Q.) "Dunfee to Start Shipping from Hornsilver." Can you tell the Court whether you read the article or not? [144]

(A.) No, I think I am confused on that paper; I don't think it is the paper I thought it was, if it

(Testimony of C. A. Terwilliger.)

is marked the 26th; the paper I have reference to is the paper with regard to a transaction with Mr. D'Arcy.

(Q.) Well, I will show it to you. (Hands paper to witness.)

(A.) I think that is an account I read, although I am not sure. I know I read an account; I can't identify either one of those newspapers.

(Q.) There is a paper of the middle of July, 1921; is that where you got your information of the Dunfee deal?

(A.) No, sir, Mr. Duffy told me; the first news I had of any kind was when Mr. Duffy told me; all I ever learned through newspapers was after Mr. Duffy had told me about the transaction.

(Q.) I understand your testimony to be it is possible that you saw this paper of March 26th, 1921, containing the article headed "Dunfee to Start Shipping from Hornsilver"?

(A.) I never saw that.

(Q.) You are positive?

(A.) I say no, I never saw that; I testify to that.

(Q.) Well, I will ask you to look at one of April, 1921, April 16th, 1921. I call your attention to an article headed, "Dunfee Breaking Ore Nine Feet Wide at Hornsilver." Did you ever see that?

(A.) No, I never saw that.

Mr. STODDARD.—What is the date of that paper?

Mr. TILDEN.—April 16th, 1921.

(Q.) I call your attention to the "Goldfield

(Testimony of C. A. Terwilliger.)

News" of May 28th, 1921, and to the article entitled "Orleans Ore Body, Seven and a Half Feet Wide, Ten Feet High." Did you ever see that?

(A.) I don't remember that at all; no, sir. [145]

(Q.) I call your attention to one of June 18th, 1921, and to the article entitled "New Find Is Made in Orleans Mine, Four and a Half Foot Wide of Ninety-dollar Ore Opened up on 580-foot Level."

(A.) No, sir.

(Q.) You never saw it?

(A.) No, sir, never saw it.

(Q.) Did you see the one of June 25th, 1921, calling your attention particularly to an article headed "Shoot in Orleans Mine is Over a Hundred Feet Long, Seven-foot Face of Forty-dollar Ore Now Being Broken by Lessee"? (A.) No, sir.

(Q.) Didn't see that? (A.) No, sir.

(Q.) Did you see an article in the "Tribune" headed, "Sale by Dunfee is $90,000 Mine Deal"?

(A.) I think I did; that is the one. What is the date?

Q. I probably unintentionally misled you on this first one I showed you, because I had that covered; there are two articles; the one you refer to is headed "130-foot Length of $30 Ore in Orleans Mine at Hornsilver." Now, you say you did see the articles headed "Sale by Dunfee is $90,000 Mine Deal"; "D'Arcy Plans Mill." When did you see that?

(Testimony of C. A. Terwilliger.)

(A.) I never saw that until after I had had a conversation with Mr. Duffy on the street in Los Angeles.

(Q.) Notwithstanding your practice of buying the "Goldfield Tribune" at the news-stand in Los Angeles? (A.) I never made it a practice.

The COURT.—What is the date of the paper that contains "Sale by Dunfee is $90,000 Mine Deal"?

Mr. TILDEN.—July 16th, 1921. We will offer these papers, may it please the Court, in connection with this witness' admission, that he did, whether he made a practice of it or not, [146] from time to time purchase the "Goldfield Tribune" in Los Angeles, and leave it as a matter of argument to infer it is peculiar that he didn't get those particular papers.

Mr. STODDARD.—We will object to the offer, if your Honor please, on the ground it is not a proper offer, not tending to prove or disprove any issue in this case; and for the further reason that the witness, plaintiff in this case, has denied ever having seen those papers until after the time he otherwise became informed of Mr. Dunfee's operations in the former leased property. The plaintiff in this case is not connected up in any way with knowledge of the statements contained in these papers concerning Mr. Dunfee's operations; he has testified that he did not see these articles, excepting this one of July 16th, which he saw subse-

quent to the time Mr. Duffy saw him, and we base our objection on that ground.

The COURT.—I will admit that one of July 16, 1921. I think that is the only one he admits that he saw.

Mr. TILDEN.—Yes.

The COURT.—That may go in.

(The "Goldfield News," of date Saturday, July 16, 1921, is admitted in evidence, marked Defendant's Exhibit "H," and the article identified by the witness reads as follows:)

DEFENDANT'S EXHIBIT "H."

"Sale by Dunfee is $90,000 Mine Deal—D'Arcy Plans Mill.

Both Sides Lucky—Dunfee Shows He is Good Miner and 'Sticker'—Started Work in January, Broke, and Makes Good—Climbs in and Out of 600-Foot Shaft and Works Alone for 52 Days—Now Loading Seventh Car.

A. I. D'Arcy of Goldfield and San Francisco associates have taken over the lease of J. W. Dunfee on the Orlean Mine at Hornsilver for a price reported to be $50,000 and have also acquired for $40,000 Dunfee's option to purchase. This ends months of negotiation in which numerous persons have tried to turn the deal.

Dunfee let go of his bonanza for two reasons: First, because he can clear as much in this way as he could by the shipment of ore over a long period,

and second, he is to have an interest of 150,000 shares of stock in the company that will own the mine. [147] The latter was his main reason for letting go of the mine. D'Arcy evidently was also an important factor in Dunfee's decision, for the latter said yesterday: 'The mine has been sampled by a good many people, but I feel that in D'Arcy we have the best man in the state to handle this deal.'

There are a number of remarkable features in connection with the negotiations that have been going on—luck for Dunfee, hard luck for others, and a humorous side.

In six months the value of Dunfee's lease increased from $2500 to $50,000. In December of last year he offered to walk off the ground and turn everything over to W. E. Sirbeck if the latter would give him $2500. Sirbeck made heroic efforts to get some one to back his judgment that the Orlean would be a winner, but he was told that Hornsilver was dead and that there was no more ore there. A firm of New York brokers told him they could not sell two bits worth of stock in a Hornsilver company and that they would not back his deal. But Sirbeck foresaw what eventually did occur and he persisted. On April 5 he obtained another option, this time for $10,000 cash, $10,000 in 90 days and 10 per cent of the stock in any company he would organize. These terms, as in all cases, were for Dunfee's lease and his option to buy the mine for $40,000.

Still Sirbeck could not induce any one to listen to him and so the Tonopah Mining Company became interested at a time when Dunfee had opened the ore for only 35 feet—fortunately for him. Dunfee made practically the same terms to the Tonopah Mining as he had in giving the second option, but the company made counter-proposals and the deal was declared off by Dunfee. The next round of drill holes fired by Dunfee after the Tonopah Mining deal had fallen through brought the first of the higher grade ore—and Dunfee was saved by good luck. It was then that he determined to take a chance, backed by his judgment as an expert miner that the shoot was a whale, and he decided to make no more deals to sell until he had determined what was in the ground ahead. Here Dunfee's judgment proved good.

The Orleans is owned by the Champ D'Or French Gold Mining Company, with offices in Paris and London. Dunfee went from Goldfield to Hornsilver in 1912 and took charge of the work of this company, which worked eight months of that year. Then E. Perrier de la Bathie, who was representing the company, went to Paris to raise more money and he returned here in 1914, just as the war started, and he returned to France. In March, 1915, Jean Perrier Charra came to Goldfield to close the mine during the war and he gave Dunfee a lease and option to purchase which was renewed in January of this year. This lease and option to

purchase is what D'Arcy and his associates have acquired.

Flat broke, Dunfee started work on June 22, 1915, by sinking a winze from the 150-foot level of the Orleans shaft. This shoot extended to 350 feet and from it Dunfee shipped $90,000 worth of ore. Then in 1916 he sunk the Dunfee shaft, to 500 feet. The ore shoot faulted at about 380 feet; then he found a shoot on the fifth level, and another 67 feet long, on the sixth level. In all, he produced during his leasing operations $263,000 worth of ore, and all of the profits he 'blew,' according to himself. Then, again flat broke and without even a grubstake, he started work in January of this year, and, working along, he climbed in and out of the 600-foot shaft every day—sometimes several times—for 52 days, [148] driving along on a five-inch seam of low-grade ore. Finally, at 203 feet from the shaft, the ore was found—the beginning of the shoot that since has attracted the attention of all Nevada.

Dunfee commenced to save ore. The first carload assayed $22.65, the second $27.75, the third $32.55, the fourth $49. He now has two carloads of $50 ore on the road to the MacNamara mill in Tonopah and another is being loaded. These figures show that there has been a constant increase in the value of the ore as the shoot was entered and confirm the statement that the best ore is near the face of the drift. The shoot has now been opened for 130 feet and the production has been made

(Testimony of C. A. Terwilliger.)

practically without stopping. Six ounces has been the highest silver content of this ore and the remainder of the value has been in gold.

Roger Downer of the Goldfield firm of Downer Brothers, assayers, is now sampling the drift on the 580-foot level and the result of his work thus far has made him a firm and enthusiastic believer in the possibilities of the mine and the actual value of the big ore shoot.

The ore contains small quantities of vanadinite, a resinous, yellowish mineral containing lead and vanadium, the former in quantity to aid in the cyanidation of the ore, treatment to which it is readily amenable. As to milling, the ore is considered in every way ideal for simple cyanidation, which adds greatly to the value of the mine to the new owners, as the plan of Mr. D'Arcy is to first block out the ore and then build a mill.''

The WITNESS.—(Continuing.) I can't tell you the exact length of time after I talked to Mr. Duffy that I saw this paper of July 16th, but it was a very short time. I think I got a paper as soon as I could get one. I don't know whether I got it in Los Angeles, but just soon afterwards I got that paper. I think I got it in Los Angeles. I will say yes, that I got it in Los Angeles. I think I got the paper in Los Angeles. I went immediately or within five days to Tonopah. I didn't stop in Goldfield. I think it was the night I got there that I employed Mr. Atkinson to look into the proposition as my counsel. I had him draw up a letter to

(Testimony of C. A. Terwilliger.)

serve on the D'Arcy Company, on the bank and Mr. Dunfee. He drew it up; I didn't dictate it.

(The letter in question is identified by the witness, admitted in evidence without objection, marked Defendant's Exhibit "I" and is as follows:)

DEFENDANT'S EXHIBIT "I."

"H. H. Atkinson,
Attorney and Counsellor at Law,
415–417 State Bank Building,
Tonopah, Nevada.

August 2, 1921. [149]

John S. Cook & Co., Goldfield, Nevada.
Orleans Hornsilver Mining Co., Goldfield, Nevada.
J. W. Dunfee, Goldfield, Nevada.

Gentlemen:

You and each of you are hereby notified that the Orleans Mining and Milling Company, a corporation, claims ownership of that certain lease on the Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1 lode mining claims, situated in the Hornsilver Mining District, Esmeralda County, State of Nevada, granted to said J. W. Dunfee by the owner of said claims on or about January 1, 1921, and claims all of money and shares of stock which said J. W. Dunfee is to receive by virtue of his assignment of said lease to persons from whom said Orleans Hornsilver Mining Company now has or claims ownership.

(Testimony of C. A. Terwilliger.)

The Orleans Mining and Milling Company consents to the said sale and assignment of said lease as far as the consideration is concerned, but claims all of said consideration, and hereby notifies all of you not to pay or deliver any of said consideration to said J. W. Dunfee, his assigns or to any person acting for, by or thru said J. W. Dunfee, but to pay and deliver said consideration as it becomes due according to the terms of said contract of sale and assignment to a trustee for the benefit of said Orleans Mining & Milling Company, and said trustee is hereby designated and appointed to be John S. Cook & Co., a corporation engaged in a banking business, at Goldfield, Nevada, said trustee to hold said funds, shares of stock, or consideration heretofore mentioned until the lawful owner thereof is determined.

Yours very truly,
ORLEANS MINING & MILLING CO.,
By C. A. TERWILLIGER (Signed),
Vice-President." [150]

The WITNESS.—(Continuing.) Referring to the fact that the letter Defendant's Exhibit "I" mentions a lease dated January 1, 1921, and my complaint says that the lease was obtained on or about June, 1920,—I think they are the same lease. (Witness is shown lease of June, 1920.) I don't think I ever saw this before. I don't remember supplying Mr. Cook with this lease. (Witness is shown lease dated January 1, 1921.) I don't believe I have ever seen that lease before. I don't

(Testimony of C. A. Terwilliger.)

know on what lease Mr. Atkinson based his letter, Defendant's Exhibit "I." The lease I am suing on is any leases which he might obtain. I don't know what they are, whether it is June or January.

(Q.) You don't mean to tell the Court you alleged in your complaint that he had conceived a fraudulent scheme in March, 1920, to obtain a lease some time in the indefinite future, do you?

(A.) Yes, that I have no knowledge of whatever.

(Q.) Any time? (A.) Yes, sir.

The WITNESS. — (Continuing.) I employed Mr. Atkinson as counsel in the beginning. I could not stipulate*d* just what to do, because I would not be the dictator of his action. He was my counsel up to a certain time; that was just before I employed Cooke, French & Stoddard. Arrangements were made for his services satisfactory to him. I employed Mr. Atkinson as counsel in the beginning, and at such time as he notified me, up until September, that it was impossible to go on with the case along the lines we had outlined; then I immediately employed Cooke, Stoddard & French. Mr. Atkinson outlined some plans as my counsel. That notice is the procedure; then from time to time I had letters where he would try to get intelligence on the case; that was about the nature of the procedure. It was quite a few months before I concluded to change counsel—from the middle or latter part of July until March [151] of this year—until I *release* him as counsel and notified him that I was going to consider other counsel if

(Testimony of C. A. Terwilliger.)

it was agreeable, and he approved of it. I employed him to investigate in detail and I deemed he would do whatever he considered necessary as my counsel. I think he applied to Mr. Edwards for leave to examine the corporate records and papers pertaining to the case. I think I signed a letter authorizing Mr. Edwards to show him everything. I think he looked at the books and everything a very short time after I employed him.

(Q.) Do you know whether or not he encountered any concealment on anybody's part?

(A.) Well, I don't think he ever mentioned to me anything about these letters you have shown me here, or anything of that kind.

(Q.) Did he find a disposition on anybody's part to conceal anything from him?

(A.) I don't know.

Redirect Examination by Mr. STODDARD.

John Winkler, who I stated in my direct examination was working upon the property during its operations, and sent some reports or letters to me, worked upon the property approximately three months. I believe in 1917 or 1918 in March, April and May or near about that time. I replied to the letter of March 26th, 1920, which I stated in my cross-examination is the last ltter or communication which I received from Mr. Dunfee. I think that I replied to it on May 2d, 1920, by the letter which has been read in evidence and is in the pleadings. I never received a reply to that letter. The money paid to me by the corporation for expenses,

(Testimony of C. A. Terwilliger.)

as testified on my cross-examination, was, besides traveling expenses for attorney's fees, incorporating, books and seals and such things as that. It includes [152] the items that are mentioned in my contract with Mr. Dunfee, dated September 2, 1916. When I say attorney's fees I mean attorney's fees for the incorporation of the company. They amounted to around two hundred or two hundred and fifty dollars, including the fees of the Secretary of Arizona and the filing fee.

(Q.) I will hand you what purports to be a lease, dated June 5, 1920, from what has been designated here as the French Company, to J. W. Dunfee, purporting to lease the Orleans No. 1, Orleans No. 2, Orleans No. 3, Orleans Extension and Orleans Extension No. 1, mining claims in Hornsilver Mining District, the term of the lease being for one year from date, and ask you to state to the Court if you have ever seen that lease, or a record of it or a copy of it at any time.

(A.) No, sir, not to my knowledge.

Mr. TILDEN.—If you want that in I will consent.

Mr. STODDARD.—We would like to offer it at this time, I think it will save time. We will offer this lease in evidence, if your Honor please.

The COURT.—What is the date of that?

Mr. STODDARD.—The lease is dated June 5, 1920, from the French Company to J. W. Dunfee, as lessee; term of the lease for one year, and leasing the mining claims mentioned heretofore in this ac-

tion. Endorsed upon the face of the front page of the lease in writing, are the words, "Cancelled January 1, 1921," under which appear the names "E. Carter Edwards, Attorney-in-fact," and "J. W. Dunfee." The lease is signed by the French Company, by E. Carter Edwards, Attorney-in-fact, and by Mr. Dunfee as lessee. That is all at this time.

(The lease is marked Plaintiff's Exhibit No. 11, and is as follows:)

PLAINTIFF'S EXHIBIT No. 11.

[Written across face of instrument:] "Cancelled January 1, 1921. E. Carter Edwards, Attorney-in-fact. J. W. Dunfee."

"THIS AGREEMENT, made and entered into this the Fifth day of June, 1920, by and between LE CHAMP D'OR FRENCH GOLD MINING [153] COMPANY, LIMITED, a Corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7, Old Broad Street, E. C., and an administrative seat in the City of Paris, France, at No. 1, place Boieldieu, party of the first part and hereinafter referred to as the Company; and Mr. J. W. DUNFEE, party of the second part, and hereinafter referred to as the Lessee;

WITNESSETH, that the Company, for and in consideration of the rents, covenants and agreements hereinafter reserved and expressed, to be kept and performed by the Lessee, has leased and

let, and by these presents does lease and let unto the said Lessee, the following described premises and mining property, situate near the town of Hornsilver, County of Esmeralda, and State of Nevada, to wit:

All these certain lode mining claims, situated in Hornsilver Mining District, Esmeralda County, Nevada, known and designated as Orlean No. 1, Orlean No. 2, Orlean No. 3, Orlean Extension, and Orlean Extension No. 1, at and near the town of Hornsilver, and also the machinery erected thereon together with hoist, tools, rails, etc., and more particularly described in Schedule No. 1 hereto annexed.

TO HAVE AND TO HOLD, for the purpose of mining, from the date hereof up to and including the First day of June, 1921 M said Lessee in consideration of the premises, covenants and agrees with the Company, its successors and assigns, to work immediately after 10 days from the date of this agreement, and to work the same continuously in a workmanlike manner, keeping the same securely timbered and to pay royalty to the Company, its agent or attorney, as rental for said premises, as follows, to wit:

ROYALTY, flat rate of Twenty (20%) per cent on the full value of the ore shipped by the Lessee, after deducting the sum of Ten Dollars ($10.00) per ton for transportation and reduction expenses and also the bullion tax, the said sum of ten dollars being agreed upon by both parties. The said Royalty to be retained by purchaser of ores and

thereupon immediately paid by said purchaser to the credit to E. Carter Edwards, attorney in fact of the Company, or his successor.

It is further understood and agreed between the parties hereto, that the Lessee shall give the Company a three (3) days' notice of the shipment of any and all ores and that the said Lessee shall work at lease sixty (60) shifts of one man per shift during each and every month continuously during the lifetime of this lease and all work to apply to assessment work of the Company.

During the term of this Lease the Company shall at any time have the right to ascertain the existence, state and condition of the tools, machinery and material, as described in Schedule No. 1, and to call upon the Lessee to make good to the Company any parts of said tools, machinery and material that might be missing, destroyed or damaged. And the Lessee, at the expiration of this Lease, agrees to make good to the Company all said tools, machinery or material that might have been lost, destroyed or damaged, during the term of said Lease.

No assignment of this Lease, or right to sublet said premises, or any part thereof, shall be made or given, without the consent in writing of the Company being first had therefor. [154]

It is further understood and agreed that should the Lessee fail to work at least sixty shifts of one man per shift during any month of the life of this lease, this lease will terminate at the end of the following month, and any and all ore extracted by

the Lessee during the month the Lessee shall fail to work at least sixty shifts as aforesaid, and not removed the month following such failure to work, shall be and remain the property of the Company.

It is hereby mutually understood and agreed, that in case any disagreements or disputes shall arise between the parties hereto as in their respective rights under this lease, or what is due and owing thereunder from the Lessee to the Company, for royalty or for any other matter that shall come up for settlement or adjustment under its terms, that the Company shall in such case or cases choose one person, the Lessee a second person, and these two a third person, as arbitrators, and such three persons so chosen shall have the power to hear, arbitrate, and finally decide all such matters or questions that shall arise or come up for settlement under the terms of this lease, and neither party shall have the right to appeal from the award and decision of such arbitrators, the right of appeal being hereby waived by both parties.

It is further understood and agreed hereby, that in consideration of the sum of One Dollar ($1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and gives to the party of the second part, the right and option to purchase the said Orlean Group of Lode Mining Claims together with the property and fixtures belonging to the party of the first part located thereon, in the Schedule hereto annexed, described, and made a part hereof,

upon the following terms, to wit; The party of the second part hereby agrees to pay to the party of the first part for said mining claims and property, the sum of Forty Thousand Dollars ($40,000), Ten Thousand Dollars ($10,000.00) the first payment of said purchase price to be paid down in cash at the date the party of the *second shall* choose to exercise said option to purchase, written notice of the date of exercising said option to purchase shall be given by the party of the second part to the party of the first part, its agent or attorney; Fifteen Thousand Dollars ($15,000.00) the second payment of said purchase price to be paid within Ninety (90) days from the date said first payment is made, and the balance, to wit; the sum of Fifteen Thousand Dollars ($15,000.00) within six (6) months from the date of said first payment.

The party of the second part shall have the right to exercise said option to purchase at any time within the life of this lease, and if the option is exercised within the term of this lease, and a part of the payments under said option are made within the term of this lease and a part of said payments shall extend beyond the term of this lease, the party of the first part, in such a contingency, agrees to extend this lease a sufficient time to time necessary to make such payments, as may extend beyond the term.

Upon making full payment for said mining claims and property as herein provided, the party of the first part hereby agrees to immediately

make, execute, acknowledge, and deliver to the party of the second part, his executors, administrators, or assigns, a good and sufficient Deed of Conveyance, conveying and transferring all the right, title, interest and property claim or demand whatsoever of the party of the first part, of, in, or to said [155] Mining Claims and property, free of any and all incumbrance by it suffered or done.

The right to anticipate any of said payments, and to pay off the full purchase price of said mining claims and property, before the dates and times mentioned and set forth for making payments of said purchase price is hereby given.

Time is of the essence of this contract, and promptness is required, and upon any failure to make any payment as herein provided, the party of the first part shall have the right to forfeit all the rights of the party of the second part herein, and to retain all moneys paid hereunder as liquidated damages for the breach of this contract on the part of the party of the second part, and upon any such forfeiture, the party of the first part shall have the right of immediate possession of said property, with or without process of law.

IN WITNESS WHEREOF, The parties hereto, have hereunto set their hands and seals, this 5th day of June, 1920.

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED. (Seal)

By E. CARTER EDWARDS,

Its Attorney-in-fact.

J. W. DUNFEE. (Seal)

SCHEDULE No. 1 ANNEXED TO LEASE DATED THE FIFTH DAY OF JUNE, 1920.

STOCK OF TOOLS, MACHINERY & SUPPLIES AT THE ORLEANS MINE.

1 #400 Champion forge blower.
1 Blacksmith's vice.
1 Large Anvil.
2 Mine trucks.
1 Jack-screw.
2 Windlass drums.
75 ft. of ½ inch steel cable.
3 Windlass buckets.
2 Whims.
1 Adze.
2 Saws.
1 Steel square.
5 Shovels.
7 Picks.
1 Claw hammer.
300 lbs. ⅞ inch drill steel.
75 lbs. ⅝ inch drill steel.
1 Ore screen (about 3′6″ x 5′), and ore sacknig funnel.
2 Single jack drill hammers (4).
1 Pair blacksmith tongs.
1 Drill sharpening hammer.
1 Ball pointed hammer.
1 8-inch monkey-wrench.
1 14-inch pipe wrench.
3 small mortars.

(Testimony of C. A. Terwilliger.)

400 ft. Air pipe,

1 #417 Western gas engine 25 HP, with self-tipping car, rope, etc., in good order.

Rails and fittings in main shaft and drifts.

1 Building known as the Hotel. [156]

(The house now leased to Mr. Martin, after sold to Tim Connolly, is not included in this Schedule.)

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED.

By Its Attorney-in-fact.

Recross-examination by Mr. TILDEN.

I was in Los Angeles, 4419 Finley Avenue, on March 26th, 1920, and remained there almost continually; that is my home and my address where I receive my mail and everything of the kind. I do not recall having left there at any time within a couple of months after that.

(The lease, January 1, 1921, is offered by defendant Dunfee, admitted in evidence without objection, marked Defendant's Exhibit "J," and is as follows:)

DEFENDANT'S EXHIBIT "J."

"THIS AGREEMENT OF LEASE, made and entered into this the first day of January, 1921, by and between LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED, a corporation duly organized and existing under and by virtue of the laws of England, having its principal place of business in the City of London, England, at No. 7 Old Broad Street, E. C., and an administrative

seat in the City of Paris, France, at No. 1, Place Boieldieu, the party of the first part and hereinafter referred to as the Company; and J. W. DUNFEE, of Goldfield, Nevada, the party of the second part hereinafter referred to as the Lessee;

WITNESSETH: That the Company for and in consideration of the rents, royalties, covenants and agreements hereinafter reserved and expressed, and to be kept and performed by the Lessee, has leased and let, and BY THESE PRESENTS, does lease and let unto the Lessee, the following described premises, mining claims, and mining property, situate at and near Hornsilver, County of Hornsilver, County of Esmeralda, and State of Nevada, to wit:

ALL THOSE CERTAIN LODE MINING CLAIMS, situated in Hornsilver Mining District, Esmeralda County, Nevada, known and designated as Orlean No. One (1), Orlean No. Two (2), Orlean No. Three (3), Orlean Extension, and Orlean Extension No. One (1), and also the machinery erected and being thereon together with hoist, tools, rails, etc., more particularly described in Schedule No. 1 attached, and made a part hereof.

TO HAVE AND TO HOLD, for the purpose of mining from the date hereof up to the first day of January, 1925, and to be completely terminated and ended on the 31st day of December, 1924, being for the term of four (4) years from date. Said Lessee in consideration of the premises, covenants and agrees with the Company, its successors and assigns, to work immediately after the date of this

Lease said mining claims continuously in a workmanlike manner and minerlike manner, keeping the same securely timbered, and the tunnels, drifts and workings thereof clear and clean of all rubbish, debris, muck or waste, and to pay Royalty to the [157] Company, its agent, or attorney, as rent for said premises, as follows, to wit:

ROYALTY, to be paid hereunder shall be Fifteen (15%) per cent of the full value of all ore shipped or mined from said premises, after first deducting all costs and expenses of treatment, reduction, and transportation, as per milling or smelter returns of the same, such royalty to be retained by the purchaser of said ores, and immediately paid over to E. Carter Edwards, Attorney-in-fact of the Company, or his successor.

IT IS UNDERSTOOD AND AGREED between the parties hereto, that the Lessee shall give the Company Three (3) days' notice of the shipment of any and all ores, and the destination of the shipment.

IT IS ALSO UNDERSTOOD AND AGREED, that said Lessee shall work sixty (60) shifts each and every month during the continuance of this Lease, and all work done shall apply on the assessment work of the Company for said claims.

During the continuance of this lease, the Company shall at any and all times within business hours, have the right to enter in or upon said premises for the purpose of ascertaining the condition of the tools, machinery and material described in Schedule No. 1 hereto attached, and of the Mines,

and the Lessee at the expiration of this lease or earlier determination thereof as herein provided, agrees to make good to the Company for all of said tools, machinery, or tools that shall be lost, destroyed, or damaged, ordinary wear and tear of the same being excepted.

No assignment of this lease, or right to sublet said premises, or any part thereof, shall be made or given, without the consent in writing of the Company being first had therefor, and all assignments or subleases made, except with the consent in writing of the Company first had therefor, shall be absolutely null and void for any purpose whatever.

IT IS FURTHER UNDERSTOOD AND AGREED, that in case any disagreements or disputes shall arise between the parties hereto as to their respective rights under said lease, or what is due or owing thereunder from the Lessee to the Company for royalty or for any other matter or thing whatever that shall come up for settlement or adjustment under this lease, that the Company shall in all such case or cases choose one person, the Lessee a second person, and these two a third person, as arbitrators, and such three persons so chosen shall have the power to hear, arbitrate, and finally decide all such matters or questions that shall so arise or come up, and neither party shall have the right of appeal from the award and decision of such arbitrators, the right of appeal being hereby waived by both parties.

IT IS FURTHER UNDERSTOOD AND AGREED BETWEEN THE PARTIES HERETO, that in consideration of the sum of One Dollar ($1.00) to the party of the first part in hand paid by the party of the second part, the receipt whereof is hereby acknowledged, the party of the first part hereby grants and gives to the party of the second part, the right and option to purchase the said Orlean Group of Lode Mining Claims together with the property and fixtures belonging thereto attached and located thereon, in the Schedule hereto annexed described, and made a part hereof, upon the following terms, to wit: The party of the second part hereby agrees to pay to the party of [158] the first part for said mining claims and property, the sum of Forty Thousand Dollars ($40,000.00), Ten Thousand Dollars ($10,000.00), the first payment of said purchase price to be paid down in cash at the date the party of the second part shall choose to exercise this option to purchase, written notice of the date of exercising this option to purchase shall be given by the party of the second part to the party of the first part, its agent or attorney; Fifteen Thousand Dollars ($15,000.00) the second payment of said purchase price to be paid within Ninety (90) days from the date said first payment is made, and the balance, to wit: The sum of Fifteen Thousand Dollars ($15,000.00), shall be paid within six (6) months from the date of said first payment.

The party of the second part shall have the right to exercise this option to purchase at any time

within the life of this lease, and if the option is exercised within the term of this lease, and a part of the payments under said option shall be on dates beyond and outside the term of this lease, the party of the first part, in such contingency, agrees to extend this lease a sufficient time necessary to make such payments, that may so extend beyond the term hereof.

The right to anticipate any or all of said payments, and to pay off the full purchase price of said mining claims and property, before the dates and times mentioned and set forth herein for making payments, is hereby given.

Upon making full payment of the purchase price of said mining claims and property as herein provided, the party of the first part hereby agrees to immediately make, execute, acknowledge and deliver to the party of the second part, his executors, administrators, or assigns, a good and sufficient Deed of Conveyance, conveying and transferring all the right, title, interest, property claim, or demand whatsoever of the party of the first part, free of any incumbrance by it suffered or done.

TIME IS OF THE ESSENCE OF THIS contract, and promptness is required, and upon the failure to work sixty shifts per month, as herein provided, each and every month during the continuance of this lease, shall be ground, at the option of the Company, to forfeit all the rights of the Lessee under this lease, and in the case of such forfeiture for failure to do sixty shifts of work per month on said mining claims, thirty days is given

for the Lessee to remove all ores and property belonging to him, mined or being on said claims, and all ores or other property found remaining on said mining claims, thirty days from the date of any such forfeiture, shall be and become the property of the Company. And upon any failure to make any payment of the purchase price of said mining claims and property as herein provided, the party of the first part shall have the right of immediate possession of said mining claims and property, and the right to gain such possession, with or without process of law. All agreements or leases heretofore existing between said parties, are hereby cancelled and annulled.

IN WITNESS WHEREOF, the parties hereto, the said first and second parties, have hereunto caused the same to be executed, the said party of the first part, by its Attorney-in-fact duly constituted and appointed, and the party of the second part, individually, in his own proper handwriting.

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED,
Party of the First Part.
By E. CARTER EDWARDS,
Its Attorney-in-fact. [159]
J. W. DUNFEE,
Party of the Second Part.

Witnesses:
G. W. THOMPSON.
BERT HUFFSMITH.

SCHEDULE No. L ANNEXED TO LEASE DATED JANUARY FIRST, 1921.

STOCK OF MACHINERY & SUPPLIES AT ORLEAN MINES.

1 #400 Champion forge blower.
1 Blacksmith vice.
1 Large Anvil.
2 Mine Trucks.
1 Jack-screw.
2 Windlass Drums.
75 feet *ft.* ½ inch steel cable.
3 Windlass Buckets.
2 Whims.
1 Adze.
2 Saws.
1 Steel Square.
5 Shovels.
7 Picks.
1 Claw Hammer.
300 lbs. ⅞ inch drill steel.
75 lbs. ⅝ inch drill steel.
4 Single Jack drill hammers, (4).
1 Ore Screen (about 3′ 6″ x 5′) & 1 ore sacking funnel.
1 Pair Blacksmith tongs.
1 Drill Sharpening Hammer.
1 Ball Pointed Hammer.
1 Eight (8) inch Monkey-wrench.
1 Fourteen inches pipe wrench.
3 Small Mortars.

400 ft. Air Pipe.

1 #417 Western gas engine 25 H. P. with self-tipping car, rope, etc., in good going order.

Rails and fittings in main Shaft and Drifts.

1 Building known as Hotel.

(The house now leased to Mr. J. Martin, afterward sold to Tim Conolly, is not included in this Schedule.)

Signed by:

LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED.

By Its Attorney-in-fact:

E. CARTER EDWARDS,

The Company.

J. W. DUNFEE,

Lessee.

Witness:

JOHN CARTER.

TESTIMONY OF MRS. C. A. TERWILLIGER, FOR PLAINTIFF.

Mrs. C. A. TERWILLIGER, called as a witness on behalf of plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. STODDARD. [160]

I am the wife of plaintiff and have been such during all of the times mentioned in this case. I accompanied my husband to Goldfield and Hornsilver in the latter part of July and the early part of August of the year 1918. I was present at a time on that trip when conversations took place between

(Testimony of Mrs. C. A. Terwilliger.)

Mr. Edwards or Mr. Dunfee, or both of them, and Mr. Terwilliger. The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st day of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

(Q.) What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously, and your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this testimony.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleadings that when a dissenting stockholder begins a suit, he should make defend-

(Testimony of Mrs. C. A. Terwilliger.)
ants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this [161] action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

Mr. STODDARD.—Do you remember the question, Mrs. Terwilliger?

(A.) The conversation as near as I can recall it?

(Q.) That is the question, yes.

(A.) The conversation between Mr. Terwilliger and Mr. E. Carter Edwards was at first a general conversation, along the line of the work that had been going on in the Orleans property, and they spoke about the conditions of the war, and the high cost of operating, and the high cost of working, and the fact that the company had been operating for many months under these conditions, and there was no profit to the company; and Mr. Terwilliger and Mr. Edwards both agreed that it seemed unwise to proceed with the work under the present war conditions; and they spoke about the large amount of development work the Orleans Company had done sinch beginning operations, and Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than that required by the lease would apply on future extensions of

(Testimony of Mrs. C. A. Terwilliger.)
the lease; and he also stated that he had received from the owning company in Paris, advice to extend the lease on the Orleans property for another year, up to June 1st, 1920, and that would be done.

The COURT.—To June, 1920?

(A.) The lease would be extended, I believe to June 1st, 1920; that was told in connection with the closing down of the property during the war conditions. He also said that he wanted to make out a report for Mr. Terwilliger to take back to Imperial Valley to the stockholders, and he would make that out so we could get it [162] the next day.

Mr. STODDARD.—Is that all you recall that took place at that particular conversation, Mrs. Terwilliger?

(A.) Well, in speaking about closing down the mine, I recall that he said Mr. Dunfee was then at work on a certain work in the mine that he was desirous of completing before he closed down the property; that he thought as soon as that was finished he would shut down; and he spoke about going to Hornsilver with us the next day, as he was going over there on business.

(Q.) Were there any further conversations between Mr. Edwards and Mr. Terwilliger in your presence in Goldfield at that particular time, or this time?

(A.) Yes, sir, the next day, which I believe was August 1st, 1918, if it was the 31st of July the day we arrived there, on the morning I will say of August 1st, 1918, Mr. Terwilliger and I called at

(Testimony of Mrs. C. A. Terwilliger.)

Mr. Carter Edwards' office, and he had a report ready that he had prepared for the stockholders; he read it to us, and when he had finished he said, "How does that sound to you, is that all right? If it is not strong enough I will make it stronger," and Mr. Terwilliger replied that it sounded all right to him. That was about all; we then left and went to the Goldfield Hotel.

The WITNESS.—(Continuing.) That was all that occurred at that particular conversation. On the next day I went to Hornsilver; the same day that Mr. Edwards read us the report we went to the Goldfield Hotel, and I there met Mr. J. W. Dunfee. (Witness identifies Plaintiff's Exhibit No. 3 as said report.) Mr. Terwilliger was present and a conversation took place between him and Mr. Dunfee—just a casual conversation. All that was said about the mine at that time was that Mr. Dunfee had had a difficult time owing to war conditions, in operating; he talked most all about his own condition, and his teeth aching, and neuritis, and the trouble that he had had physically. The next day I went to Hornsilver by automobile. [163] Present in the machine were Mr. Edwards, Mr. Terwilliger and myself. We reached Hornsilver the same day. I believe that was August 3, 1918. Mr. Dunfee was there when we arrived. A conversation was had when we first arrived at Hornsilver, at the office of Mr. Dunfee. Mr. Edwards was not present; he had gone to another section of the country in the interests of his election, but Mr. Dunfee, Mr. Terwilliger

(Testimony of Mrs. C. A. Terwilliger.)

and I met at Mr. Dunfee's office at that time. There was a general talk had at that time about the mine and the work; we walked up to the shaft and around on the surface, and Mr. Dunfee explained quite a good deal about the workings to Mr. Terwilliger but I didn't understand particularly, and about the work that he had been doing recently. Mr. Dunfee represented, or said in substance, as Mr. Edwards had said, that he was on a certain work that he expected to finish, and he said, too, that he hoped that he would open up some good ore on that work, and when that was completed he expected to close down the mine. He stated his reasons that the mine should be closed down, to wit, on the high cost of mining and milling, and on account of the depleted treasury of the company. I believe that the report that had been read to me and Mr. Terwilliger the day before was taken to Mr. Dunfee, and signed at his office, that he signed the original; there were several copies made, one for each, or nearly one for each stockholder. I again saw Mr. Edwards before I left Hornsilver and a conversation was then had relative to the property.

(Q.) Relate what that was.

(A.) We were leaving for California—

Mr. TILDEN.—(Interrupting.) Same objection.

The COURT.—It will be the same ruling.

(A.) Mr. Edwards, I will state, first came to Mr. Dunfee's office, or the office of the company, a

(Testimony of Mrs. C. A. Terwilliger.)

very short time before we left, and as we were in the machine and bidding each other good-by, Mr. Edwards said, "Now, Mr. Terwilliger, you go [164] down to Imperial Valley and tell the stockholders not to worry about their investment, that their interest will be protected in every way."

The COURT.—Was Mr. Dunfee present?

(A.) Yes, sir, I think he was; I think he was right there. We went away feeling very much relieved.

The WITNESS.—(Continuing.) Immediately prior to our leaving, or possibly while we were going up on the property, or at the office, Mr. Dunfee assured Mr. Terwilliger that if—this was about the substance of it—that if matters were left to him we would all make some money, or words to that effect, that he and Mr. Terwilliger would make a good thing out of that Orleans property, that he would do his best, and he would consider that they had a good property there.

(Q.) At the time of this trip that you saw Mr. Dunfee and Mr. Terwilliger together conversing, what did their attitude seem to be, friendly or otherwise? (A.) At the property?

(Q.) During all of this trip, both at Goldfield and at the property?

(A.) Yes; it was a little strained at first on the part of Mr. Dunfee, as he seemed to realize that he owed Mr. Terwilliger an apology or an explanation, and he did make an explanation, and they talked over their differences, and Mr. Terwilliger readily

(Testimony of Mrs. C. A. Terwilliger.)
accepted his explanation, and thereafter everything was affable. At the time of our departure when good-bys were said everything was unusually affable and pleasant and Mr. Edwards in particular was in a very jovial mood. I met Mr. Dunfee first at the Munn Hotel in Los Angeles a few days prior to September 2, 1916, from which date on up to the present time I saw very little of him. At all times when I saw him and Mr. Terwilliger together they were friendly except this time in Goldfield, there [165] was a little coolness there, but that was explained away. The memorandum in pencil on the back of the second page of the letter dated March 26th, 1920, Plaintiff's Exhibit No. 4, from Mr. Dunfee to Mr. Terwilliger, is in my handwriting. I cannot tell the exact date when that was placed upon that letter, but it was some time in the summer of 1922. I think I was in Los Angeles at the time.

(Q.) What was your purpose in writing that endorsement or statement?

(A.) I had been gathering up letters from Mr. Dunfee in connection with this case, and making out memoranda or record of same and the reply to this letter was missing, but I remembered Mr. Terwilliger dictating a letter in reply to this a short time after he received it, and of my writing it, and in the absence of the correct copy that I wrote, we discussed it, and I recalled this was the substance of the letter, and so I put that memorandum there for the use of the attorney, not as an exact copy of the

(Testimony of Mrs. C. A. Terwilliger.)
letter I sent, but as the substance of that letter; and not as the exact date, but as near as I could recall it I put it down. (Witness is shown and she reads letter dated May 2, 1920, set forth in defendant Dunfee's answer in this case.)

Mr. STODDARD.—I will hand you the original, a copy of which is pleaded in the answer, and ask you to state if that is the letter a summary of which you gave according to your recollection, in the pencil endorsement on the March 26th letter.

(A.) Yes, sir, that is the correct reply as near as I can recall it.

(Q.) And the endorsement which appears on Mr. Dunfee's letter to which this is a reply, was your best recollection at the time you made it of the contents of this one? (A.) Yes, sir.

Mr. STODDARD.—We will offer this letter in evidence, your Honor. [166]

Mr. TILDEN.—No objection.

Mr. STODDARD.—You may cross-examine.

(The letter is marked Plaintiff's Exhibit No. 12 and reads as follows:)

PLAINTIFF'S EXHIBIT No. 12.

4419 Finley Ave., Los Angeles, Cal.
May 2, 1920.

J. W. Dunfee,
Goldfield, Nev.

Friend Will:—

Your letter of some time ago received and I have been away, hence delayed in replying to same.

(Testimony of Mrs. C. A. Terwilliger.)

When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,

C. A. TERWILLIGER.

Cross-examination by Mr. TILDEN.

My purpose in going to Hornsilver was seeing Mr. Edwards and Mr. Dunfee and knowing something of the condition of the property. I was personally acquainted with all of the stockholders in Imperial Valley, and very often they talked with me about their investment in Hornsilver and also about the company with my husband there. I was anxious to see the Orleans property and Mr. Terwilliger was very anxious to see Mr. Dunfee and Mr. Edwards and the property. He and I discussed the purpose many times before we went. It did not consist merely in a desire to converse with Mr. Edwards and Mr. Dunfee. It consists in a desire to know first-hand information, and to ascertain the exact condition as near as he could find it, by a personal visit thereto. He paid all his own expenses and all of mine, so there was nothing that the company was indebted to us; we knew that the treasury [167] was low at the time, and we would have to pay our own expenses, and every dollar was paid by Mr. Terwilliger. I did not go down in the mine on that trip. I am quite positive that Mr. Ter-

(Testimony of Mrs. C. A. Terwilliger.)

williger did not go down in the mine. The underground workings we saw nothing of. We saw the dumps and the machinery and the mill and the men employed. Mr. Dunfee told me about the work. I inquired about the books, and expected to look them over—the books of the company—but did not do so; they were not available. There was no regular set of mining books kept. I asked to see the books and I am familiar with mining books; I have kept a good many sets myself; and there was nothing such as I had been accustomed to seeing or keeping. I saw a great many receipts, bills and cancelled checks on spindles, but nothing that I could get intelligence to glance over and see as you would in a company that is systematically keeping their books. I saw the evidence that would be embodied in books. I did not go there particularly to see that evidence.

(Q.) You didn't go there for the purpose of going down in the mine, and you didn't go there for the purpose of particularly *of* seeing the books, did you? (A.) Not exclusively.

(Q.) Well, what did you go for?

(A.) I went with Mr. Terwilliger to get first-hand knowledge so I could talk intelligently to the stockholders that inquired of me, and also for the satisfaction of seeing the property myself.

(Q.) Seeing the surface of it?

(A.) Yes, and hearing first-hand information from Mr. Edwards and Mr. Dunfee.

(Q.) Didn't you go there to see Mr. Dunfee?

(Testimony of Mrs. C. A. Terwilliger.)

(A.) Partially, yes.

(Q.) And talk to him, and get him to sign the August [168] 1st report?

(A.) No, sir; I didn't know that report was to be made out when we went there.

(Q.) After the report was made out wasn't that your purpose in going to Hornsilver, to get Mr. Dunfee to sign it?

(A.) No, sir, because he could have sent that by mail.

(Q.) Why could not he have signed it at the Goldfield Hotel?

(A.) The report wasn't there; the report was in Mr. Dunfee's office. Mr. Dunfee didn't come to the hotel with the report, and Mr. Dunfee was only there a short time; he was in a hurry and went back to the property.

(Q.) Isn't it a fact that you and Mr. Terwilliger came to Goldfield to get that extension?

(A.) No, sir.

(Q.) And you had it set forth in that report, and Mr. Terwilliger and Mr. Edwards signed it, and then you took it down to Mr. Dunfee to be signed, and Mr. Dunfee made some objections to it, and finally signed it; that is all there was to it, wasn't it?

(A.) I don't know that Mr. Dunfee made any objections to it before he signed it.

(Q.) Well, you don't know everything that happened there, do you? (A.) I was right there.

(Testimony of Mrs. C. A. Terwilliger.)

(Q.) Why don't you know that he made some objections?

(A.) I don't recall that he made any objections to that report; I don't recall that he did. I know it was signed, and Mr. Terwilliger signed one copy.

(Q.) You and Mr. Terwilliger advise with one another in business matters, don't you?

(A.) Yes, sir.

(Q.) I mean rather more extensively than husband and [169] wife ordinarily do?

(A.) Well, I have been a business woman for a number of years. I understand more than some women that haven't had my business experience.

TESTIMONY OF E. CARTER EDWARDS, FOR PLAINTIFF.

E. CARTER EDWARDS, called as a witness for plaintiff, and being duly sworn, testifies as follows:

Direct Examination by Mr. STODDARD.

I am the Edwards referred to as the attorney-in-fact of what we have designated as the French Company. I am an attorney practicing in Goldfield and have practiced there fifteen years or a little more. I know Mr. Dunfee and have known him *tell* or twelve years. The relation of attorney and client does not exist between me and him except as I am related to him in this leasing matter. That is, I have drawn papers, and incidentally when he had no counsel, given him advise which he

(Testimony of E. Carter Edwards.)

was willing to accept, without any employment at all. I am also secretary of the Orleans Mining and Milling Company.

(Q.) How long have you been such secretary?

(A.) Well, when they organized their company in California Mr. Terwilliger and Mr. Dunfee, so they informed me—I wasn't present, and could not say first hand,—Mr. Dunfee after the organization approached me, and said he wanted me to be a director so I could be secretary, which I didn't want to be in such a proposition, and I told him I was attorney-in-fact for the Champ d'Or or French Company, and I thought the two positions would be inconsistent.

The WITNESS.—(Continuing.) That was about the middle of January, 1917, and I have not at any time since then been removed as secretary. As secretary I have the books and records of the company, the corporate records. These are the Imperial Valley stockholders, Leslie Smith, 1,000 shares, Mrs. Jennie [170] Robinson, 2,000 shares, George J. Shank, four thousand shares, Albert Lackman, 6,000 shares, T. B. Shank, 4,000 shares, J. T. Taecker, 6,000 shares, H. P. Fites, 2,000 shares, George I. Droffmeyer, 6,000 shares, C. A. Terwilliger, 1,000 shares, evidently being for Melville W. Curns; then, of course, Mr. Terwilliger and Mr. Dunfee are the large stockholders. 300,000 shares stand in the name of Mr. Dunfee. I am the holder of about a thousand, about a thousand and one shares, something of that kind. 267,000

(Testimony of E. Carter Edwards.)

shares stand in the name of plaintiff, C. A. Terwilliger. John Winkler is a stockholder, 200 shares standing in his name. The total issue at this time is 1,000,000 shares, the whole capitalization; the treasury contains 400,000; of this 200 was issued to Mr. Winkler. That would make the total outstanding stock 600,200. The directors of the Orleans Mining and Milling Company are Mr. Dunfee, Mr. Charles Ellsworth, who is deceased, myself and Mr. Stoddard. All of these persons named have been directors since the organization of the company except myself and Mr. Ellsworth who were put in afterwards. I was put in as director on January 15, 1917. Mr. Ellsworth died last year; I would not like to give the exact date—I think some time during the year 1921. The officers of the company are J. W. Dunfee, president and general manager; C. A. Terwilliger, vice-president; myself, secretary, and I think Mr. Dunfee acted as treasurer too; he had charge of the funds. I think all of these parties named have been officers since January 15, 1917, and are such at the present time. Referring to the 600,200 shares issued, there has been no change since this action was commenced. I have been attorney for the French Company since September, 1915, just the date in September I don't remember.

Witness identifies his power of attorney and the same is admitted in evidence without objection, marked Plaintiff's [171] Exhibit No. 13, and reads as follows:

PLAINTIFF'S EXHIBIT No. 13.

"KNOW ALL MEN BY THESE PRESENTS: That Le Champ D'Or French Gold Mining Company, Limited, a corporation, does, by these presents, constitute and appoint E. Carter Edwards its lawful attorney, for it and in its name, place, and stead, to receive all moneys due on royalties to said Company, from the Leases of the property of said company situated at Hornsilver, Esmeralda County, Nevada, known as the Orleans Group of Mines and the mines at Tokop, in said county, and State, known as the Tokop group of mines, now occupied and being operated under Leases with said company by W. J. Dunfee, and Nicholas Theo, respectively, and to settle and adjust all questions for said company that may, can or does arise out of or by reason of said leases, with the respective parties aforesaid thereto, including the appointment for said company of arbitrators, if the same shall become necessary, under the terms of said leases, and also, in case one or both of said leases shall end and determine by reason of a violation or nonfulfillment of the terms and conditions thereof, to make other leases for the leasing to other person or persons said properties, to wit: Said Orleans, or Tokop properties. A full description of said Orleans and Tokop Group of mines, is set forth and described in said leases to Dunfee and Theo, aforesaid, reference to which is hereby made. And to manage *it* business and affairs and represent it in

all matters of or concerning the Silver King Mining Company and its stock.

Giving and granting unto our said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises as fully and to all intents and purposes as it might or could do if personally present, with full power of substitution and revocation, hereby ratifying and confirming all that its said attorney of his substitute shall lawfully do or cause to be done, by virtue [172] of these presents.

IN WITNESS WHEREOF, the said Le Champ d'Or French Gold Mining Company, Limited, has executed and delivered this Instrument by its attorney-in-fact, duly made, constituted and appointed therefor, dated the 29th day of July, 1915.

LE CHAMP D'OR FRENCH GOLD MINING COMPANY, LIMITED, a Corporation.

By J. P. CHARRA,
Its Attorney-in-fact.

State of Nevada,
County of Esmeralda,—ss.

Before me, Adams Franklin Brown, a notary public in and for said County and State, duly appointed, qualified, and acting, personally appeared Le Champ d'Or French Gold Mining Company, Limited, a corporation, by its attorney-in-fact Jean Pierre Charra, to me known to be the individual described in and who executed the foregoing power of attorney for and on behalf of the said Le Champ

(Testimony of E. Carter Edwards.)

d'Or French Gold Mining Company, Limited, and the said Charra acknowledged to me that he executed the same on this the 29th day of July, 1915, freely and voluntarily, and for the uses and purposes herein mentioned.

IN WITNESS WHEREOF, I have hereunto set my hand and Official Seal at my office in Goldfield, Esmeralda County, Nevada, on the 29th day of July, 1915.

[Seal] ADAMS F. BROWN,

Notary Public in and for Said County and State.

My Commission expires the fourth day of Feb., 1917.

(Cancelled Revenue Stamp for 25¢.)

[Endorsed]: Power of Attorney from Le Champ d'Or French Gold Mining Company, Limited, a Corp., to E. Carter Edwards. Dated July 29th, 1915. 13032. Filed for record at the request of E. Carter Edwards February 4, 1918, at 30 minutes past 1 o'clock P. M. [173] and Recorded in Book 10 of Powers of Atty., Page 58, Records of Esmeralda County, Nevada. Clyde P. Johnson, County Recorder. W. Deputy. Compared. Indexed."

The WITNESS.—(Continuing.) The property mentioned in the power of attorney, Plaintiff's Exhibit "13," called the Tokop property, is about nine miles from the Orleans property. Mr. Dunfee was the lessee on the Orleans property in 1915. By Orleans property I refer, and this power of attorney refers, to the Orleans Group mentioned in

(Testimony of E. Carter Edwards.)

the pleadings in this case. Mr. Dunfee continued to be a lessee of the property until he assigned his lease to the Orleans Mining and Milling Company. He did that with the consent of the French Company. Referring to the writing across the face of the lease of June 5, 1920, Plaintiff's Exhibit No. 11 (reading), "cancelled January 1st, 1921," and signed by E. Carter Edwards, attorney-in-fact, and J. W. Dunfee, that writing was placed on there on the date it bears. That is my signature; that lease was delivered for cancellation in the fall but actually cancelled at that date. The lease dated January 1, 1921, Defendant's Exhibit "J," was given subsequently to this cancellation; that is my memory. The cancellation of the one lease and the giving of the other was at the same time. I wish to state that the lease was really made subsequently but dated back; we had a kind of oral agreement that I would give Mr. Dunfee a lease on the terms of that lease, and when he struck the ore, I dated back to the time I made the oral lease. I am referring to the lease dated January 1, 1921. I prepared the leases. The oral lease was in effect from the time that the oral agreement was made, about the 1st of January, 1921, up to the time that Mr. Dunfee struck ore, which was about the 1st of March; now, I would not be accurate, but about that time—the same year. Mr. Dunfee had possession of the property and was working it during that time with my permission. [174] He has been in and upon that property and in possession of it

(Testimony of E. Carter Edwards.)

from the year 1915 up to the present time, except during the time that the Orleans Mining and Milling Company was in control, and from the time he surrendered this lease for cancellation (referring to June 5, 1920, lease) until I made this lease (referring to January 1, 1921 lease), in which interim you might say the property was vacant. Under that oral agreement Mr. Dunfee had permission of the French Company to go upon the property and work it if he desired to—oral agreement to the same effect as the written, put in writing when the time came, and Mr. Dunfee asked for it. I acquired my 1,001 shares of stock when they gave me some stock to qualify me as a director. I did not ask for it. It was given me by Mr. Dunfee and Mr. Terwilliger. I am not so sure of Mr. Terwilliger being present when it was given. I think the stock has never been delivered to me; it is still in the book and signed, and the book is in my possession. I do not think that is a part of the Dunfee stock; I can look at the book and say. (Book handed witness and after examination of same he continues:) I have looked the matter up, and I find one certificate for one share to E. Carter Edwards, and another for a thousand shares to E. Carter Edwards; the one for the thousand is from the treasury, so I would like to correct my testimony to that extent, that that much was taken from the treasury. The one share was transferred to me from N. A. Pickett, formerly a director and was issued before there was any treasury stock.

(Testimony of E. Carter Edwards.)

It is certificate No. 69, dated September 20, 1916, signed J. W. Dunfee, president, and E. Carter Edwards, secretary. Certificate 69 was issued to Pickett; my certificate is number 73, both of date of September 20, 1916, and both signed by Dunfee as president and Edwards as secretary. As to my testimony to the effect that I became secretary in January, 1915,—I would like to correct that; they wanted me to be secretary soon after they organized. I would not like to say the date [175] because I could not say the exact date, but Mr. Terwilliger was selling stock in Imperial Valley; it was necessary to deliver that stock down there in order to get money, and Mr. Dunfee insisted after the organization that I should be secretary. I should therefore say that I was secretary *that I was secretary* earlier than January, 1917; they came up there and ratified what I had done before by appointing me. I have no doubt I was secretary on September, 1916; I have no doubt Mr. Dunfee came up there and had me act. Referring to the certificate of stock standing in the name of Mr. Ellsworth, which represented 250 shares and was issued from the treasury—that was certificate numbered 17, dated September 20, 1916. I suppose it is signed in the same manner as the rest.

Cross-examination by Mr. TILDEN.

I counseled with Mr. Terwilliger as well as Mr. Dunfee. I never showed the least preference between them. I never gave them to understand that I would act in hostility to my power of attorney

(Testimony of E. Carter Edwards.)

from the French Company or my fidelity to the French Company; I would act for the French Company at all times. I performed my last act as a director or an officer of the Leasing Company on November 11, 1918. That company never functioned in any way after that to my knowledge. November 11, 1918, was my last act for the Orleans company. There was nobody on the property from October 10, 1918, until May 31, 1920. The next person to go on there after that date was Mr. Dunfee, when I gave him the lease or after I gave him the lease of June 5, 1920. He stayed in actual physical possession and presence on the property in the month of June and July and the early part of August. He was then broke, and spent his money and quit working the property. He left the property. He remained off the property until he went back after the 1st of January, 1921. He was in physical possession of the property after that date under first the oral agreement or [176] contract, and secondly, under the lease dated January 1st, 1921. The oral agreement lasting until about the 1st of March.

Redirect Examination by Mr. STODDARD.

The Orleans Mining and Milling Company has never been dissolved as a corporation. Its office has been in my office in Goldfield and that is the office of the company now and has been at all times since it started in business in this state. I have custody of all of its books and have them in my office in Goldfield or here in the courtroom.

TESTIMONY OF A. R. D'ARCY, FOR PLAINTIFF.

A. R. D'ARCY, called as witness for plaintiff, sworn, testified as follows:

Direct Examination by Mr. STODDARD.

I reside in Goldfield, Nevada. I know a corporation known as the Hornsilver Orleans Mining Company and its president. I have been its president since it was organized which was July 22, 1922. I know Mr. Dunfee, one of the defendants in this case. I had a transaction with him with reference to the Orleans group of mining claims at Hornsilver. I purchased a lease and option from him; the date of the agreement between him and me was July 18, 1922. I am familiar with the lease dated January 1, 1921, marked Defendant's Exhibit "J" in this case.

(Q.) Was the transaction that you had with Mr. Dunfee with reference to his lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend [177] our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. I want to elaborate that point a little in my motion to dismiss. This complaint is rather a difficult complaint to construe, and it seems to be based partly on allegations of fraud and partly upon a contract. I don't like to go into it very fully now.

The COURT.—Well, I will overrule your objection at this time and allow the question, and the testimony will go in subject to your objection; if you don't care to argue it now, I don't care to decide it now.

Mr. TILDEN.—Well, I would like to have it go in subject to an objection which will be covered by my motion to dismiss, otherwise I will have to argue my objection now.

The COURT.—I think it may just as well go in; it will go in anyway as part of the record, either with the order that it is not admissible or with the order that it is.

Mr. TILDEN.—Well, I will make this objection at this time; it is a little too general in its nature, but it may cover the ground, namely, that the contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of "Thereto belonging" will be clear: (Reads:) "In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans

Development Mining & Milling Company, consisting of a lease on the following five claims''—naming the claims—''together with all other extensions or purchases thereto belonging,'' evidently meaning belonging to said lease, ''said second party agrees to raise,'' and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal [178] aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. That is one objection. The other objection goes to the allegations of fraud. Your Honor will notice that these allegations are of two kinds, fraudulent representations and fraudulent concealment; and before I read this I call your Honor's attention at the beginning to the fact that these are not allegations of false representations, as understood by the rules of pleading with respect to this branch of fraud, nor with respect to the rules that measure the sufficiency of such allegations to constitute a cause of action; in other words, they are allegations that are promissory wholly in their nature. I call your Honor's attention to that so you will notice it as I read. I will also call your Honor's attention to the fact that they are conditional, that is, that their operation is conditional, the condition being twofold; first, that one of the parties interested shall express his desire that they shall operate; second,

(Testimony of A. R. D'Arcy.)

that a necessity for their operation shall arise, and that there is no proof in this case that any such desire was ever expressed, or that any such necessity ever arose.

I have made that as clear as I would like in elaborating the motion to dismiss, but those points cover the objection I have to your Honor's hearing this testimony from Mr. D'Arcy.

The COURT.—I will overrule the objection, and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now.

The WITNESS.—(Continuing.) The transaction I had with Mr. Dunfee was with reference to his lease, Defendant's Exhibit "J." I entered into an agreement with him to purchase all rights secured by him in that lease. When I say I did, I do not mean our Company, but that I did it personally at that time. That was in writing. [179]

Mr. TILDEN.—My objection covers all of this, does it, your Honor, so I need not renew it?

The COURT.—Certainly, this whole matter. As I understand it, he can give any testimony with reference to this agreement, that is not subject to the objection that is made; the objection is to the agreement, it is an objection to all the testimony with reference to this transaction.

(Testimony of A. R. D'Arcy.)

Mr. FRENCH.—I so understand it.

The WITNESS.—(Continuing.) I have a copy of that agreement with me (hands same to counsel). This agreement was dated July 18th, 1921. We didn't get our charter for the Orleans Hornsilver Mining Company until after the agreement was entered into, that is, as I recollect it, July 22d, 1921, is the date of our charter. After the Orleans Hornsilver Mining Company obtained its charter, we proceeded right from the time that agreement was entered into; I, individually, and then afterwards the Orleans Hornsilver Mining Company, proceeded along the lines of that agreement. The lease, Defendant's Exhibit "J," was never assigned by Mr. Dunfee to the Orleans Hornsilver Mining Company or to me. This agreement was referred to, or at least this lease and option is referred to in that agreement, and under that I am to receive all the rights and benefits of that lease and option; and I in turn assign the agreement dated July 18, 1921, to the Orleans Hornsilver Mining Company. The consideration we gave to Mr. Dunfee was $15,000.00 paid on the 18th day of July, 1921. I made that individually. On the 3d of January, 1922, there was a payment of $4,028.33 made to Mr. Dunfee, paid to his credit into the John S. Cook Bank in Goldfield, which held the escrow papers. That was made by me as a loan to the company; that was made by my individual check. Additional consideration for the agreement last mentioned was 150,000 shares of the stock of the

(Testimony of A. R. D'Arcy.)

Orleans Hornsilver [180] Mining Company issued and delivered to Mr. Dunfee in the latter part of July, 1921. The Orleans Hornsilver Mining Company now owes Mr. Dunfee $20,000.00 on account of this contract. At the present time that is the form of notes; we have given the Company's note for $20,000.00, due June 1, 1923. It was shortly after July 18, 1921, that I went upon the Orleans group of claims, took charge of the work there, and commenced operating. I had been upon the ground before that. I had been more or less familiar since along in 1916. I examined the property before I purchased it. The last examination I made was along about April, visits made from time to time along about the first of April until July 18th, 1921; Mr. Dunfee was on the ground when I was making my examinations.

(The agreement between Dunfee and D'Arcy, marked Plaintiff's Exhibit No. 14, is admitted in evidence without objection and is as follows:) [181]

PLAINTIFF'S EXHIBIT No. 14.

WHEREAS, J. W. DUNFEE, is the Lessee, and LE CHAMP d'OR FRENCH GOLD MINING COMPANY, LIMITED, is the Lessor in that certain Lease and Option dated the first day of January, 1921;

And WHEREAS, A. I. D'ARCY is desirous of purchasing all the right, title and interest of said J. W. Dunfee in said Lease and Option, and thereby

acquire title to the mining claims and mining property in said Lease and Option described, in A. I. D'Arcy, Trustee, in like manner as J. W. Dunfee is entitled under said Lease and Option to acquire title therein;

NOW THIS AGREEMENT, made and entered into this the 18th day of July, 1921, by and between J. W. DUNFEE, of Hornsilver, Nevada, the party of the first part, and A. I. D'ARCY, of Goldfield, Esmeralda County, Nevada, the party of the second part, consented to and approved by E. Carter Edwards, Attorney in Fact for Le Champ d'Or French Gold Mining Company, Limited:

WITNESSETH:

That for and in consideration of the payment by the party of the second part to the party of the first part of the sum of Forty Thousand Dollars ($40,000.00) in the manner hereinafter provided, and the delivery to the said party of the first part by the Company to be organized by the party of the second part which shall hereafter operate and develop the mining claims and mining property, of 150,000 shares of the promotion stock of said company in 1000 share certificates or in such convenient amounts as the party of the first part shall order, the said Company to have capital stock in an amount not to exceed 1,500,000 shares, the party of the first part hereby agrees to assign, sell, transfer, and convey to the party of the second part, all the right, title, interest, property claim or demand

whatever, of the party of the first part, of, in, or to, that certain Lease and Option aforesaid dated the 1st day of January, 1921, made by Le Champ d'Or French Gold Mining Company, Limited, Lessor, to J. W. Dunfee, Lessee. Said Lease and Option is hereby referred to and made a part hereof.

The manner of payment of said Forty Thousand Dollars ($40,000.00) to said J. W. Dunfee, shall be as follows, to wit: Fifteen Thousand Dollars ($15,000.00) the first payment thereof, shall be paid to J. W. Dunfee the party of the first part by the party of the second part, in cash, on the date of the delivery of a deed duly executed by Le Champ d'Or French Gold Mining Company, Limited, grantor, to A. I. D'Arcy, trustee and grantee, conveying title of, in and to, the mining claims and mining property in said Lease and Option described and intended to be sold shall be deposited in the Bank of John S. Cook & Company, at Goldfield, Nevada, with escrow instructions directing the manner and dates of making payments to J. W. Dunfee and to Le Champ d'Or French Gold Mining Company, Limited, for their respective interests in said mining claims and mining property herein intended to be sold, and that pending the time that shall be used in making and delivering such deed in escrow as aforesaid the said $15,000.00 cash payment, to J. W. Dunfee shall be deposited in the Bank of John S. Cook & Company to the credit, and for the sole use and benefit of said J. W. Dunfee, and to be paid to said J. W.

Dunfee immediately by the said Bank of John S. Cook & Company, upon the deposit of said deed and escrow instructions as aforesaid, as and for said first payment of $15,000.00; Fifteen Thousand Dollars ($15,000.00) in [182] cash, six (6) months from the date hereof, that is to say on the 18th day of January, 1922, as the second payment thereof; and the balance, to wit, the sum of Ten Thousand Dollars ($10,000.00) twelve (12) months from the date hereof; that is to say on the 18th day of July, 1922, as the third and last payment thereof.

The party of the second part expressly assumes and agrees to pay Le Champ d'Or French Gold Mining Company, Limited, for the mining claims and mining property and fixtures thereto attached and thereon situated used in the operation of said Lease and Option, the purchase price in said Lease and Option provided, to wit: the sum of Forty Thousand Dollars ($40,000.00) in the manner, and upon the payments, and terms therein provided, or to anticipate said payments and pay off the whole or any greater part of said purchase price by paying the payments in said Option provided at such earlier dates as the party of the second part shall choose to make them, and upon making full*y* payment for said mining claims and mining property, property, and fixtures, the Deed in Escrow as aforesaid, shall be delivered by the Escrow Holder, to the party of the second part conveying title as aforesaid of, in, and to said mining claims and mining property, property and fixtures to the party of

the second part as trustee, said mining claims are described as follows, to wit: Orlean No. One (1), Orlean No. Two (2), Orlean No. Three (3), Orlean Extension, and Orlean Extension No. One (1), situated in Hornsilver Mining District, Esmeralda County, Nevada, in said Lease and Option described.

The total purchase price to be paid for the right, title and interest of the said J. W. Dunfee, of, in, and to, said Lease and Option, and to Le Champ d'Or French Gold Mining Company, Limited, for title to said mining claims and mining property, property, and fixtures, shall be $40,000.00 to J. W. Dunfee and $40,000.00 to Le Champ d'Or Gold Mining Company, Limited, making the total amount paid, the sum of $80,000.00, in the manner and upon the payments and terms herein provided.

Possession of said mining claims and property, fixtures, and personal property, shall be given by the party of the first part to the party of the second part, at the end of thirty (30) days from the date hereof, said time being given Le Champ d'Or French Gold Mining Company, Limited, to make and deliver said Deed to be placed in escrow as aforesaid, and should the said Le Champ d'Or French Gold Mining Company, Limited, refuse to make and deliver said deed at the end of thirty (30) days as aforesaid, then and in such case of refusal to make and deliver such deed, the party of the second part shall have the right to do two things, to wit: First, to purchase said Lease

and Option and proceed to develop said mines and mining claims thereunder, or Second, to draw down said $15,000.00 deposited to the credit and for the use and benefit of J. W. Dunfee, in the Bank of John S. Cook & Company, as aforesaid, and be released from this agreement. In case of the party of the second part making choice of drawing down said sum of $15,000.00, it shall do so within ten (10) days from the end of said Thirty (30) days, or upon failure to demand the withdrawal of said sum of $15,000.00 within said ten (10) days, shall be deemed to have waived the right, and in such case of waiver, the party of the second part shall be considered to have elected to proceed under said Lease and Option in the development of said mines.

It is further understood and agreed that during said Thirty (30) days prior to the time of taking possession as aforesaid, the said J. W. Dunfee, shall sink the winze or drift therefrom, but shall do no other mining in said premises, with right to [183] ship the ore so mined in sinking and drifting from said winze, paying royalty therefor to E. Carter Edwards, attorney in fact of Le Champ d'Or French Gold Mining Company, Limited, as in said Lease and Option provided.

When the full payment of $40,000.00 shall be paid to J. W. Dunfee, according to the terms, and upon the payments in this agreement provided, the assignment, sale, transfer, and conveyance of all the right, title and interest of J. W. Dunfee, of, in, and to, said Lease and Option, shall become and be fully

vested and completed in said A. I. D'Arcy without any further or other instrument in writing to make or effect such assignment or transfer from J. W. Dunfee to A. I. D'Arcy, and as if such assignment had been made upon the immediate payment of the whole of said $40,000.00 in cash by the said A. I. D'Arcy to the said J. W. Dunfee.

Upon the full payment of said $40,000.00 to E. Carter Edwards, attorney in fact, as aforesaid, the said Le Champ d'Or French Gold Mining Company, Limited, hereby agrees to make, acknowledge, execute and deliver to A. I. D'Arcy, Trustee, the deed mentioned and agreed to be made in said Lease and Option to J. W. Dunfee, to be placed in escrow for delivery as aforesaid.

The said party of the second part hereby agrees to develop said mines and mining claims, and to ship no ores therefrom of the value of $30.00 and under per ton. That the party of the second part shall have the right, however, to ship all ores mined or found in said premises over the value of $30.00 per ton, or not, at his choice or discretion. In case of shipment of ores as aforesaid, the net proceeds of such shipments, to be determined by first deducting the total costs, charges and expenses of hauling, transportation, treatment or reduction, and taxes, shall be paid and distributed, as follows, to wit: Royalty to E. Carter Edwards, attorney in fact of Le Champ d'Or French Gold Mining Company, Limited, by the purchaser or reducer of said ores as is in said Lease and Option provided, and

the balance of said net returns to J. W. Dunfee, party of the first part herein to be applied on the next payment or payments coming due hereunder, instructions to be given by the said E. Carter Edwards, attorney in fact, J. W. Dunfee and A. I. D'Arcy to the purchaser or reducer of said ores so shipped, which said three parties hereby agree to give, directing such payment and distribution of such net returns.

Time is the essence of this contract or agreement, and promptness is demanded, and should the said party of the second part neglect, fail, or refuse to make any payment to the said J. W. Dunfee, or to E. Carter Edwards, attorney in fact as aforesaid, in this agreement or in said Lease and Option provided, then, and in such case of neglect, failure, or refusal to make such payments, the party of the first part hereto, or Le Champ d'Or French Gold Mining Company, Limited, respectively, shall have the immediate right to forfeit all the rights of the party of the second part, of, in, and to, this agreement and under said Lease and Option, and in case of such forfeiture or forfeitures, all moneys paid hereunder, or under said Lease and Option, whether to said J. W. Dunfee or to E. Carter Edwards, attorney in fact as aforesaid, shall be retained by said J. W. Dunfee and Le Champ d'Or French Gold Mining Company, Limited, respectively, as liquidated damages for the breach of this agreement and of said Lease and Option, and the party of the first part shall have the right of immediate possession of said mining claims and

mining property, property, and fixtures herein agreed to be sold, with or without process of law, which possession the [184] party of the second part hereby agrees to surrender and give up peaceably to the party of the first part, and the full terms of said Lease and Option shall be revived and reinstated in the party of the first part as if this agreement had never been made.

As evidence of the consent and approval of Le Champ d'Or French Gold Mining Company, Limited, to this agreement in writing, as well as to its agreement to make, execute, and deliver the Deed in said Lease and Option provided, to A. I. D'Arcy, Trustee, it has joined in the signature of this Agreement.

IN WITNESS WHEREOF, the parties of the first and second parts hereto, and Le Champ d'Or French Gold Mining Company, Limited, showing its consent in writing to this Agreement, have hereunto set their hands and seals, and Le Champ d'Or French Gold Mining Company, Limited, has caused the same to be executed by its attorney in fact, E. Carter Edwards.

J. W. DUNFEE, (Seal)
Party of the First Part.
A. I. D'ARCY, (Seal)
Party of the Second Part.
LE CHAMP D'OR FRENCH GOLD MINING CO., LIMITED,
By Its Attorney-in-Fact;
E. CARTER EDWARDS,
In Consent and Approval. [185]

(Testimony of A. R. D'Arcy.)

Cross-examination by Mr. TILDEN.

I examined the Orleans property also in July, 1920. I had been through the mine and at various times I had taken a few samples and I don't recall just how many times, but I had been through the mine several times before 1920. I am familiar with all of the levels of the mine. There are two working shafts on the Orleans property, one called the Orleans shaft, and the other known as the Dunfee shaft. I examined the Orleans shaft in July, 1920. We went down the shaft, went through the workings west of that shaft, all that were available and open; then we came up and walked through the 150-foot level over to the Dunfee shaft; then we went along 150-foot level as far as we could go to the east or southeast, then through the various levels on down to the 600-foot level, inspecting each of the levels as we went through. This examination took practically a day. I was not again on the property until about April, 1921. I am now able to give the exact dates. The date of the agreement between Mr. Dunfee and myself was July 18, 1921, and the date of the payment of the $15,000.00 was the same. The date of the charter of Orleans Hornsilver Mining Company was July 22, 1921. The date the 150,000 shares were delivered to Mr. Dunfee was the latter part of July, I think it was the 30th, of 1921. I think I made a mistake in my former testimony in the date of the years; they are 1921 and 1922. The stock payment was

in 1921. The date of the payment of $4,028.33 was January 3, 1922.

(A letter heretofore identified, dated December 28, 1916, marked Plaintiff's Exhibit No. 15, is admitted in evidence without objections and is as follows:) [186]

PLAINTIFF'S EXHIBIT No. 15.

Goldfield Hotel,
Goldfield, Nev.

Dec. 28, 1916.

C. A. Terwilliger
Brawley Cal.

Friend Cal.

Rec. $500 today this makes total $2000 you have sent me.

Mr. Elsman told me he had sent you the Final Report I got after him and he was supposed to mail it about 2 weeks ago. I will get in communication with him and see what the reason he hasent sent it. They have arrived to make the survey for the water for the mill. They are supposed to have $150,000 ready by 2 of Jan. 1917. If you dont arrive by first of year I will write my Co. a report for the year and also ask that lease be extended as their letters states that no doubt I can have it as long as I want it. Will mail you a report up to Dec 31 1916. Just now I am crosscutting at 345 level. Not in ore. At present as you fully realize that everything is not ore. Will let you know just what this work discloses by first

which will show us just what to do about sinking our shaft deeper. The mine is always ready for inspection so come when you are ready to look it over.

Yours very truly,
J. W. DUNFEE.

Will call on Belmont to see if I can get the facts you ask for.

(Envelope:) (Goldfield) (2–1¢ Stamps)
(Dec. 29)
(7—AM.)
(1916)

J. W. DUNFEE
Hornsilver
Nev.

C. A. TERWILLIGER,
Brawley,
Cal.

Imperial Valley. [187]

A letter heretofore identified, dated March 21, 1917, marked Plaintiff's Exhibit No. 16, is admitted in evidence without objection and is as follows: [188]

PLAINTIFF'S EXHIBIT No. 16.

Goldfield Hotel
Goldfield, Nev

March 21 1917

Friend Cal.

Rec your letter and telegram. We are compelled to aid all we can in getting the mill in Hornsilver.

I was called to Reno to discuss treatment charges for our ore, and they claim as we are largely benefited by mill we should stand half of the water expenses. Now you must realize it is absolutely necessary that we have a mill or it is curtains with us, so I am trying to work out a plan here to get the water in Hornsilver. Dont get peeved about what you read in the newspaper there misleading write up every day. It was you that wanted the Eng. Report not me and he answered the purpose, so it not necessary to fall out with him or he might give the other Co. valuable information. We had to much over head expense I going to avoid any in the future Just actual work in the mine will be allowed. I haven't shipped but one car this month. Expect truck here within a week to ship again. The ore went about $25.

I got lease extended one year to June 1919, as I assured you I could, but the proviso is that I am to be the manager of it as they state they rather work the property by Co. account than to have the mind handled by strangers as they realize no Eng. ideas as good as mine in working this mine for all experts turned it down. Sorry to say we can't pay a 10% dividend in April as we must sink our shaft soon. I drifted out 160 ft. on the 400 no shipping ore. This point seems to be where the hang had dropped and cut the ore up pretty bad. Sink-

(Testimony of E. Carter Edwards.)

ing I believe will overcome it. Best regard to all the stockholders. [189]

Yours Truly,
J. W. DUNFEE.

(Envelope:) (Goldfield) (2¢ Stamp)
(Mar 22)
(6 AM)
(1917)

J. W. Dunfee
Hornsilver, Nev.

C. A. TERWILLIGER
Brawley Calif

Imperial Valley. [190]

TESTIMONY OF E. CARTER EDWARDS, FOR PLAINTIFF (RECALLED.)

E. CARTER EDWARDS, recalled for plaintiff, testified as follows:

Direct Examination by Mr. STODDARD.

The last directors' meeting held by the Orleans Mining & Milling Company was held November 11, 1918. The last meeting of stockholders was held in Los Angeles, California, August 14, 1917. At the directors' meeting above mentioned the directors present were Mr. Dunfee, myself and Mr. Ellsworth. Mr. Ellsworth is now deceased. (Witness is shown minute-book of Orleans Mining & Milling Company and reads from minutes of directors' meeting of November 11, 1918, as follows:)

"Goldfield, Nevada, November 11, 1918. Meeting of Board of Directors at the office of the company

(Testimony of E. Carter Edwards.)

at 106 East Crook Street. Directors present: J. W. Dunfee, President; C. H. Ellsworth; E. Carter Edwards, Secretary. The statement of J. W. Dunfee as general manager of the business of the company, closing down the lease was presented to and examined by the Board, by which it appeared that the company was entirely out of funds, with some unpaid bills out. Upon discussion of the statement, the letter of C. A. Terwilliger, bearing date September 30, 1918, was produced and read to the Board, in which he ordered the mine closed down for the reasons stated therein, which letter is referred to and hereby made a part hereof. It appearing to the satisfaction of the Board that the company was without funds, it was duly moved and seconded that said statement be accepted, and the lease be closed down according to the request of Mr. Terwilliger in said letter contained. There being no further business before the Board, the meeting was adjourned until the next regular meeting." Signed J. W. Dunfee, President. A. Carter Edwards, Secretary." [191]

The WITNESS.—(Continuing.) I cannot state exactly how many tons of ore were extracted from the Orleans group of claims during the operations of the Orleans Mining & Milling Company. I think I got some $15,000.00 of royalties out of the operation, the royalty being the greater part of the time 26¼% of the net proceeds. I left those matters of the operation to Mr. Dunfee and Mr. Terwilliger, and I preferred that, because I was attorney-in-fact

(Testimony of E. Carter Edwards.)

for my company, and I at all times preserved myself for the uses and purposes of my company. As I said before, these men insisted on my being a director against my wish, and I remonstrated and told them that I had to represent the French Company, and I might make decisions that they might not like.

TESTIMONY OF J. W. DUNFEE, FOR PLAINTIFF.

J. W. DUNFEE, the defendant, called as a witness by plaintiff, duly sworn, testified as follows:

Direct Examination by Mr. STODDARD.

I was and am president and general manager, treasurer and director of the Orleans Mining and Milling Company. About 4,500 tons of ore were extracted by the Orleans Mining & Milling Company during its operations upon the Orleans group of mining claims. This includes ore of all classes. The shipping ore averaged about $23.00 a ton, the milling ore around $14.00 and $15.00. Included in the 4,500 tons of ore extracted were about 3,500 tons of milling ore and about 500 tons of shipping ore—about 800 and something, of shipping ore. I have got that wrong. There were about 800 tons of shipping ore and the balance of the 4,500 tons was milling ore. The company paid one ten per cent dividend only to the Brawley stockholders.

Cross-examination by Mr. TILDEN.

That ten per cent dividend amounted to $800.00.

(Testimony of J. W. Dunfee.)

It did not come out of the profits of the mine. It came from Mr. Terwilliger's $5,000.00 he put up to make his last payment. That came [192] about in this way; he said if he would let me pay a ten per cent dividend he would go down there and raise $40,000 or $50,000.00 to buy the mine if I would let him pay that ten per cent dividend.

Redirect Examination by Mr. STODDARD.

Mr. Terwilliger did not receive any of that ten per cent dividend; he was supposed to take it to the Brawley stockholders; I mean for the other stockholders excluding Mr. Terwilliger.

Mr. TILDEN.—Didn't he receive $2,500.00 of it? (Referring to the $8,000.00 raised by Mr. Terwilliger.)

(A.) Yes, according to his own checks.

Mr. STODDARD.—That is plaintiff's case in chief.

Mr. TILDEN.—Before you close, Mr. Stoddard, I want to ask Mr. Terwilliger: The mine equipment all belonged to the French Company, did it not?

Mr. TERWILLIGER.—Yes.

Mr. STODDARD.—I want to ask at this time permission to amend the complaint by interlineation, and I will submit it to counsel for any objections he may desire to interpose. The interlineations, if your Honor please, that we desire to make by way of amendment at this time, the first is not objected to by counsel. The second proposed interlineation by way of amendment, the first is at line 10, on

page 9 of the complaint: "Did secretly negotiate for and later," after the word "later" we desire to insert the words "to wit, on June 5, 1920." An amendment which we also desire to make at this time, and which I understand is objected to by counsel, is on line 12, of the same page 9, erase "December, 1920," the first two words on line 12, and then insert, "January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon"; so that as amended it would read, commencing at line 10, page 9, "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and [193] on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said defendant Dunfee," continuing.

Mr. TILDEN.—We object to that, may it please the Court, on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney-in-fact for the lessor company. The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it speaks for itself, and becomes a matter of law as to what it is

and its character. I don't think there is any evidence whatever to justify such an amendment. I suggested to counsel that he say that on January 1, 1921, a further lease, or another lease, or an instrument was issued, of which a copy is attached to the complaint, and let that copy speak for itself as to what it is.

Mr. STODDARD.—We desire to make the amendment as offered, if the Court please, and base upon it the facts that have been adduced upon the plaintiff's case in chief, and upon the lease itself.

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. This is not a ruling on my part that they have proven it; I am simply allowing them to put that in the complaint because they believe it does conform to the evidence; the defendant thinks it does not, and that will be one of the things I must decide. You may take your exception. [194]

Mr. TILDEN.—If your Honor will allow me.

The COURT.—That is all?

Mr. STODDARD.—That is the plaintiff's case in chief, your Honor.

Mr. TILDEN.—May it please the Court, at this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial; namely, that the dismissal of the action as to the D'Arcy Company leaves no cause

(Testimony of R. H. Downer.)

of action as to anybody. I said at that time that I could have been prepared with authorities, and I am now prepared with a few on that subject. The motion so far as it relates to the equities of the case I have sketched in writing, so I can present it in the very briefest possible time; and at the outset I will call your Honor's attention to what I believe to be the proper deductions for us to take from the contract set forth in the complaint and the matter supplemental to the contract set forth in the complaint.

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

TESTIMONY OF R. H. DOWNER, FOR DEFENDANT.

R. H. DOWNER, called as a witness for the *plaintiff,* duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live at Goldfield, Nevada. Am a mining engineer and assayer. Have been such in Goldfield and Colorado since 1901.

Mr. STODDARD.—There is no question at all about his competency.

The WITNESS.—(Continuing.) I have been familiar with the Orleans property since July, 1921. There are two working shafts on that property,

(Testimony of R. H. Downer.)

connected. I made a map of the underground [195] workings based upon a map previously made by the engineers employed by the Tonopah Mining Company. I have made several maps, the last one carrying the work up to date, March 1, 1922. I checked up the work shown on the map given me by the Tonopah Mining Company and also included on my map such work as had been done since the making of the map of the Tonopah Mining Company. (Witness produces map made by him and the same is offered in evidence on behalf of defendant Dunfee.)

Mr. STODDARD.—We will object to the offer, if your Honor please, on the ground that this map shows the condition of the mining property in 1922, I understand.

Mr. TILDEN.—Our idea is to show the condition from time to time.

The COURT.—What is the purpose of that in a suit against Mr. Dunfee?

Mr. TILDEN.—I am going to show that all of these allegations of concealment and of a valuable condition in the mine itself made by the plaintiff, and upon which plaintiff apparently bases his cause of action, are not in accordance with the fact.

The COURT.—Well, it would be concealment of conditions at that time; the mine may have been enormously rich, and may have been a wretched mine at that time.

Mr. TILDEN.—I am going to try to give your Honor a view of the mine, and then I am going to

take the witnesses through the mine by means of this plat, and prove what the condition of the mine was at the time it was shut down, and the conditions that developed in the mine from the time that Mr. Dunfee ceased.

The COURT.—Do you contend that you should recover anything more than your share of what Mr. Dunfee received when he sold that property?

Mr. STODDARD.—No, your Honor; that is solely the proposition. [196]

Mr. TILDEN.—If it please the Court, must we not show that Mr. Dunfee did not conceal from these people?

The COURT.—Certainly, but suppose he did conceal after he had made the sale, what difference would that make?

Mr. TILDEN.—It would not make any difference, your Honor; but here is a man that illustrates all that I desire to prove, and it happens to illustrate a little more.

The COURT.—Well, go on; you can show the condition of the mine from the time it was sold, backwards.

Mr. TILDEN.—That is just what this map will do.

The COURT.—Up to the time that the lease was sold to Mr. D'Arcy and his associates.

Mr. TILDEN—I ask that this plat be introduced in order to illustrate the testimony of the witnesses, who will do what your Honor just suggested.

The COURT.—Very well. It is only admitted for

(Testimony of R. H. Downer.)

illustrated purposes; it is not admitted as being a correct statement of condition in the mine at the time the lease was sold by Mr. Dunfee to Mr. D'Arcy. (The said plat is appended at the end of this statement.)

The WITNESS.—(Continuing.) I think this plat is prepared with sufficient detail to show conditions of this property in 1918, 1917 and 1916. I was not present to investigate the conditions at that time. The developments as I understand them, that have taken place during those years, do not materially change the condition of the mine; the ore that was extracted by Mr. Dunfee was mostly taken out previous to that time; then the map showed the condition as the Tonopah Mining Company found it at the time of the sale; my investigation is verified by conditions; that refers to the workings in the older part of the mine, disregarding that subsequent work by Mr. D'Arcy. I have no information regarding development work upon that property for, for instance, [197] the year 1917. The map does not designate or differentiate the work by the year or anything of that kind; it shows the total development work that has been done.

The COURT.—Can you draw a line through this map showing how far the work had extended on the date when the lease was sold to Mr. D'Arcy?

(A.) Yes, sir, I think I could.

The COURT.—To Mr. Stoddard: If he does that will you be satisfied?

Mr. STODDARD.—Yes, your Honor.

(Testimony of H. G. McMahon.)

The COURT.—Please do that, Mr. Downer, and put your initials on the line after it is drawn.

(The witness does as directed.)

(The map is admitted in evidence and marked Defendant's Exhibit "K." Mr. Downer was temporarily withdrawn as a witness.)

TESTIMONY OF H. G. McMAHON FOR DEFENDANT.

H. G. McMAHON, called as a witness by the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield and have lived there or in the state since 1905. I am a miner. My experience as a miner has been that since 1900 I have been engaged in the development of mining properties in their operation, and the operation of surface works, in so far as they apply to mining operations, and the purchase and sale of mining properties. This has included the examination of mines, with the object of learning their value from their appearance. I have been actively engaged in that line for more than twenty years. Am familiar with the Orleans property to a certain extent. My first visit to the Orleans mine was I believe in July, 1920. I spent about one day at the property in the examination of the mine. There are two working shafts, one called the Orleans and the other the Dunfee shaft. (Witness indicates same on map.) [198] In making my examination we started at the collar

(Testimony of H. G. McMahon.)

of the Orleans shaft, and climbed down to the 200-foot level, and then passed along this level, examining what appeared therein; then we climbed up to the 150-foot level and went over to the Dunfee shaft, and then climbed down that shaft to the 600-foot level, and on route visited all of the workings that were accessible. When I say I climbed down to the 600-foot level, that means that I climbed down to the point marked with the red line on the map by Mr. Downer (the preceding witness.) I examined the mine with respect to its ore showings. I don't recall exactly what parts were inaccessible, there might have been some workings in the upper level that were closed with cavings, but I don't recall just what the condition was there. The bottom of the Orleans shaft was open. I made this examination with the idea of purchasing the property.

Mr. STODDARD.—If your Honor please, we want to interpose an objection to all this line of testimony, as to what parties examined that mine subsequent to the times mentioned; and also to all testimony as to what attempts were made by defendant Dunfee to sell to various parties. The point that we are concerned with, and what is in issue here, is the fact that this officer, holding and occupying a fiduciary relation to the stockholders of this company, did sell the property, and not as to what dickers he made; and we will object to any testimony in that respect as being absolutely irrelevant and immaterial to the issues in this case, and

(Testimony of H. G. McMahon.)

to the condition of the mine at any time subsequent to July, 1921, as being entirely incompetent; and we wish to interpose and have that objection go to all this class of questions.

Mr. TILDEN.—The purpose of this question is to show that Mr. McMahon did not go there as an idle spectator, that he went there with a substantial business reason; that the mine had been [199] offered to him for a certain sum of money, and that after an examination of the mine he refused to entertain the offer at that or any sum.

The COURT.—The testimony may go in subject to Mr. Stoddard's objection.

Mr. STODDARD.—All testimony of this character.

The COURT.—Well, if there is anything new I want you to suggest it.

Mr. STODDARD.—I will suggest it, if the Court please.

The WITNESS.—(Continuing.) I had a proposition pending concerning that property from Mr. Dunfee. He offered to sell his lease and option to purchase the mine for $6,000.00.

Mr. STODDARD.—That is objected to; these questions are under the ruling?

The COURT.—Yes, they are all objected to; and I suppose the objection is broad enough to cover this too.

The WITNESS.—(Continuing.) I rejected the offer. I based my rejection on the fact that I thought that the showing in the mine would not

(Testimony of H. G. McMahon.)

justify the payment, or any payment. There were no representations made to me as to ore in the mine, and my only object in passing through it was to note the geological condition. Mr. Dunfee made no representation of ore, and I saw none. I won't say that exactly; there was some ore there, but there was no tonnage. As to the ore that I did see in the west end of the property, in the vein where it was exposed on the 200-foot level, there was some ore which Mr. Dunfee represented as worth $2.00 a ton. I took no samples. Down in the east end of the property in the lower levels, only a few colors remained and some broken ore lay along the drift; there was no tonnage at all in that end of the mine. I didn't see any ore in the lower levels except just the few tons of broken ore. There were places undoubtedly where the vein appeared, that was of low grade material; it was not [200] represented to me as being commercial grade, and I took no samples as Mr. Dunfee had made no statement that it was a commercial grade, I considered that of course it wasn't. Mr. Dunfee took a couple of samples. The lowest and the furthest point in the mine that I visited was on the 600-foot level, and reached out to about this point (pointing to a point through which the vertical line was drawn by Mr. Downer the preceding witness) the workings stopped there.

Cross-examination by Mr. STODDARD.

I arrived on the property some time during the morning and stayed there until late in the after-

(Testimony of H. G. McMahon.)

noon. I was actually in the property in the neighborhood of six hours. I took no samples and had none assayed. Two samples were taken by Mr. Dunfee and were panned on the surface. That was my first visit to the property.

Q. I assume you understand what wasn't ore was what Mr. Dunfee didn't claim to be ore; is that correct?

A. He made no representation of any ore there, so I of course assumed that the material wasn't pay.

Q. And you are testifying upon that information, are you not? A. Yes.

The WITNESS.—(Continuing.) The ore that was panned was from the smaller pillar, and some loose material in the drift that Mr. Dunfee sampled, and these samples were taken to the surface and ground up and panned, and they showed some value. That is the only examination as to values that I made. My other information as to values was acquired in this way: In passing down through the mine I made as close an observation of it as possible, and there was no place in the mine where any mineralization showed that would indicate to me as a practical miner that it [201] would carry any value. One becomes accustomed to visiting mines, and can tell whether the material looks as if it will carry values or not.

Q. Would you in examining such a property, with the view of purchasing it, rely upon such an examination?

A. Indeed not; if I thought it was worthy of

(Testimony of H. G. McMahon.)

purchase I would then sample it very thoroughly, but in that case I didn't feel that the property was worthy of examination and sampling.

Q. Your feeling in that respect and your judgment in that respect were guided largely then by representations made by Mr. Dunfee as to values and mineralization, and what the mineralization in that particular ledge or drift carried?

A. Rather the lack of representations made by him.

TESTIMONY OF A. I. D'ARCY, FOR DEFENDANT.

A. I. D'ARCY, called as a witness by defendant, previously sworn, testified as follows:

Direct Examination by Mr. TILDEN.

Mr. TILDEN.—Are Mr. D'Arcy's qualifications as a mining engineer admitted?

Mr. STODDARD.—Certainly.

The WITNESS.—As I said in my previous testimony, prior to July, 1920, I made several trips. I don't recall just how many. I think the first one was in 1916, and from there on several trips in addition, to the Orleans mine; and then of course since July 18, 1921, I have had the management and control of the operation of the mine. I was there in July, 1920, when Mr. McMahon the preceding witness visited the property as described in his testimony.

(Testimony of A. I. D'Arcy.)

Mr. STODDARD.—We renew our objection to these matters.

The COURT.—Very well, it all goes in subject to the objection.

The WITNESS.—(Continuing.) That trip consisted of a trip [202] as described by Mr. McMahon; I don't think I could add anything to that. We went down the Orleans shaft to the 200-foot level, walked through to the end of the level, and then came back and climbed back to the 150-foot level; then walked along the 150-foot level to the Dunfee shaft, and then as far in the 150-foot level as we could get on account of a cave that was farther in that; then down the shaft and visited the various levels to the bottom, the 600-foot level. There was a drift run out in the 600-foot level. (Witness points to same on map, indicating a perpendicular red line running through a cross-cut.) This drift runs along the footwall of the vein, and this is a cross-cut which comes out towards the hanging-wall of the vein; the vein is dipping towards us; this drift runs along the footwall side of the vein, and at this point here (indicating) there is a cross-cut comes out towards the hanging-wall, and it was right in here that the end of the drift was at that time.

Q. Is that point about which you have just testified the point through which the vertical red line runs?

A. If I were drawing a line at the end of the drift at that time, I would draw it back a little

(Testimony of A. I. D'Arcy.)

further than that, because the red line cuts a portion of the cross-cut, and that cross-cut was not visible at the time I visited the property in July, 1920.

Q. That work evidently extends further than the point which you have indicated; what is that further extension?

A. Well, that is work that was done subsequent to July, 1920.

Q. Do you know by whom it was done?

A. Yes.

Q. By whom? A. By Mr. Dunfee.

Q. Now I am going to ask you to tell what you saw up to the point of that vertical line, describe the mineralization [203] briefly, and then the mineral values, and then compare that with the work beyond that point, which you say was afterwards done by Mr. Dunfee.

A. Well, these drifts follow what is known as the Orleans vein; these go out there, and there is more or less quartz and mineralization there; there is a stope, showing where ore had come out, and little pillars that were left there of the character of ore that had come out of there. And then the condition of the vein beyond the point that had been stoped, we were able to compare the character of the pillars with what remained at that time; and that is true, not only here but all through the mine; these works follow very close,—follow the Orleans vein, and they wave around, may not follow one streak, but they are always in the vein, it is a wavy

(Testimony of A. I. D'Arcy.)

vein, and the drift can take in the whole vein but this point here. I will state the idea I had in mind was this, that there were certain little pillars left in the old stopes, that we were able to compare the physical appearance of that ore in comparison with the balance of the vein through the mine; there was no showing, that is, none of this material that was being shipped, or stoped rather.

Q. In your last answer you have been testifying concerning the 200-level of the Orleans?

A. I mean that is the same. I am using that simply to illustrate. The conditions I found throughout the mine down to a point here (indicating on Exhibit "K"), and right in here we did find some of the same quartz material, that looked like and had the appearance of being pretty good ore.

Q. When you say here, how can you indicate that so it will get in the record?

A. Well, it is in what we call a little underhand stope on the 600-foot level at that time.

Q. What was the result of your comparison of those [204] pillars with the rest of the mine?

A. Well, I came to the conclusion that there was no ore bodies in sight in the mine, that is, of the commercial grade of ore that we were looking for, and at that time I remember of taking a few samples just simply to verify that opinion; I don't think there was very many of them. I think there was only four or five.

Q. You say there were no ore bodies; was there any mineralized ore in sight?

(Testimony of A. I. D'Arcy.)

A. Yes, there was quartz; there was the ordinary vein filling that you find in this particular character of veins.

Q. Now I asked you to compare the work on that 600-level done by Mr. Dunfee after the time you were there, that you have just described, with the rest of the work in the mine.

A. Well, that was very much higher grade stuff, I know, because I had the privilege of sampling it, and finding that it was a very much better grade, and subsequent sampling that has been done in the mine has proven that those upper exposures were of low-grade stuff, low-grade material.

Q. Did you measure that additional work done by Mr. Dunfee? A. I think I did; yes.

Q. To what extent was it sampled?

A. Well, every five feet, it was sampled very thoroughly.

Q. Can you tell the Court on the strength of what you entered into the deal with Mr. Dunfee that is involved in this action?

A. It was entirely on the showing beyond the point of the drift in July, 1920, and what I saw, I think it was April, 1921; in other words, it is the point just beyond the red vertical line, that is taking into consideration my objection to the red line not being quite far enough this way. [205]

TESTIMONY OF GORDON M. BETTLES, FOR DEFENDANT.

GORDON M. BETTLES, called as a witness on behalf of the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield; am a mining engineer; have been such for ten years, practicing the last seven years in Goldfield, and prior to that in Utah. Am familiar with the property known as Orleans at Hornsilver. I was in that property the first time in October, 1920, and on two or three occasions since. I went there to examine the property for the purpose of purchasing it, if it met with my satisfaction after examination.

Q. Tell the Court what you did after that date.

Mr. STODDARD.—We make the same objection.

The COURT.—It will be admitted subject to the objection. I wish you would be just as brief as you can with that, Mr. Bettles.

The WITNESS.—(Continuing.) I made a thorough examination of the property, covering almost two days, and did some sampling.

Q. How far had the property been developed at that time? A. Shall I indicate on the map?

Q. If you will.

Mr. STODDARD.—The same objection to all of this.

The COURT.—It will be the same ruling.

(Testimony of Gordon M. Bettles.)

The WITNESS. — (Continuing.) Referring to the vertical line drawn by Mr. Downer, that, I should think, was the point when the work was ended when I examined the property. My examination was with respect to values in sight if they were any such. I did not find any that I could consider of commercial value. As the result of my examination I did not accept the offer, which was for $2,000.00 in cash, and a 20% interest in any company which might be formed to finance and work the property. I went there a couple of times after ore had been discovered by Mr. Dunfee, purely as a matter of interest to check up on my former examination. [206] I can't state definitely how far the point of discovery of the Dunfee was from the point I have indicated as the lowest working at the time of my examination in October, 1920, but I should say within possibly 30 or 40 feet.

Mr. TILDEN.—In view of your Honor's desire that I make this very short, I will say that is all that I want of this witness.

Cross-examination by Mr. STODDARD.

I took some samples on my first visit and had them assayed with the result that they were unsatisfactory; some of them were interesting; they did not indicate the presence of ore in commercial quantities, which I was looking for. I was accompanied by an associate of mine when I went through the property and by Mr. Dunfee.

TESTIMONY OF WILLIAM E. SIRBECK, FOR DEFENDANT.

WILLIAM E. SIRBECK, called as a witness for the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Goldfield. My business is that of mine executive; have been such off and on since 1906, practicing that business in Nevada and Arizona. I have had experience in the examination of mines for ten years off and on, with J. K. Turner, consulting engineer. I know the Orleans property at Hornsilver; examined it in January, 1921, with the view of purchase. I had a pending deal to purchase Mr. Dunfee's lease and option for $2,500.00.

Mr. STODDARD.—Same objection.

The COURT.—The same ruling.

Mr. TILDEN.—Q. Any interest in the ground?

A. None whatever.

The WITNESS. — (Continuing.) In examining the property I entered the main Dunfee working shaft, went to the 400-foot level, where the ore was removed, and went down the shaft from there to the lowest [207] level, and went up both drifts. I only took two samples, one at the 400 in the drift from the cave above, and one in the drift in the west end of the main drift at the 600-level. I am familiar with the point in the mine on the 600-level indicated by a vertical line drawn by Mr. Downer in the plat in evidence. That cross-cut had been driven at the time that I saw the property between

(Testimony of William E. Sirbeck.)

184 and 200 feet up to the Downer line. Cross-cuts indicated on the map were not in existence at that time. My examination did not include the Orleans shaft. I did not find any bodies of ore in the course of my examination. I found some mineral.

(Q.) To what extent?

(A.) Well, my two assays. I don't remember exactly but they were under ten dollars. As the result of my examination I rejected the property on the ground that I didn't feel like paying any cash for something without any commercial ore in sight.

Cross-examination by Mr. STODDARD.

I took only two assays. They were from the 400 level where this ore was stoped out, and the 600 level in the west end. There were at that time at the 600-level drifts from 180 to 200 feet southeast and from 60 to 65 feet west. I was not to pay any consideration in addition to $2,500.00 cash. That was the total, $1,250.00 cash and $1,250.00 in ninety days. My first acquaintance with Mr. Dunfee was in the early part of 1919, when I was operating in the Divide District. He accompanied me on these trips to the Orleans. On the trip that I have described I was down there about five hours. I went down there again before the time of my refusal, with Mr. Barnes, a Goldfield geologist, and spent another day with him. That was the extent of my examination prior to my making my decision.

(Q.) Did Mr. Dunfee make any representations as to ore bodies or ore being in the property available? [208]

(Testimony of William E. Sirbeck.)

(A.) He did not; in fact, I asked him, when I asked him if he wanted to sell his lease in the property, if he had any ore, and he said no, there might be some found.

TESTIMONY OF J. W. DUNFEE, IN HIS OWN BEHALF.

J. W. DUNFEE, defendant, called as a witness in his own behalf, previously sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I am the defendant. I am a miner and have been such for about twenty years, in Colorado and in Goldfield and Hornsilver. I have mined off and on in Hornsilver since 1913. I became acquainted with the Hornsilver property in that year by being sent there to look after the work as superintendent. I worked in that capacity until October of that year, I having been sent there in about June, then the property was closed down, and April, 1915, I worked it again for about three months for the company. After that they proposed to close it down, did close it down, and I asked for a lease on it. That is the lease that was afterwards assigned to the Orleans Mining & Milling Company. (Witness makes a mark on the map in evidence at the point in the Orleans shaft indicating the point to which the development had been carried at the time he took the lease.) There had been no connection made between the two shafts

(Testimony of J. W. Dunfee.)

at that time. Under the lease I carried the work 140 feet to the southeast in the 150-foot drift. (Witness indicates by the letter "A" on plat the point to which this work was carried.) Then I sunk the Dunfee shaft down to the 447 feet. (Witness marks last-mentioned work on plat with letter "B.") Point "B" does not indicate the point to which the mine had been developed at the time of closing down in October or November, 1918, but indicates the point to which the mine had been developed when I assigned the lease to the Orleans Mining & Milling Company. To the date of closing down of the lease I carried the Dunfee shaft on down to the 600. I did about 260 feet [209] of work on the 600-foot level; I stoped ore out of what I call a winze stope on the 600-foot level. That is right in the course of the Dunfee shaft. I did about 350 feet of work on the 500 level and also took out about 700 tons of ore there—between 500 and 700 tons. Referring to vertical line drawn by Mr. Downer on the plat across the cross-cut at the 600, that indicates the place to which I carried the work up to the time of closing down. It was about 187 feet. From the time of closing down until June 5, 1920, I did no work; never was on the property. I first met Mr. Terwilliger in Rawhide in about 1907 or 1908; knew him in Goldfield. I came to enter into this enterprise with him in this way: I was in Los Angeles, and met him on the street one day, and we got to talking of mining and I was telling him of the Orleans mine and he became very much

(Testimony of J. W. Dunfee.)

interested and wanted to buy in with me. That resulted in my entering into the contract with him. He had not examined the property prior to that. I made a full and fair statement to him of its physical condition. As to getting extensions of the lease, I always represent that as long as we did the right thing to the company and kept working we could get extensions of the lease. He had not met Mr. Edwards up to that time. Mr. Edwards was first just acting as a director, until we got organized, just a temporary director. I took the matter up with Mr. Terwilliger; he came up in January and wanted Edwards to remain as a permanent director and secretary of the company and insisted upon that point. That was January, 1917. I told him approximately how much ore had been extracted up to that time—about $75,000.00 gross. That had netted me about $22,000.00. I am referring to the time that I had the lease. The owning company did not take out any ore. After I got the lease I took out about 75,000 or 80,000 dollars gross which netted me about $22,000.00. The mine was self-sustaining at that time, that is up to the time I entered into the contract with Mr. Terwilliger. Work was being [210] done at that time. My getting Mr. Terwilliger in was with the view of purchasing the property. He told me how he could raise the money, how he had raised money on mining enterprises; if I would let him come in he would raise the money to buy the property.

Mr. STODDARD.—If your Honor please, we ask that the answer be stricken until we interpose an objection to that last question, upon the ground it is parol testimony, tending to vary the terms of a written contract.

Mr. TILDEN.—I think it is objectionable on that ground. If this is going to apply to counsel's case as well as mine, I am willing that should be the rule to govern this case.

Mr. STODDARD.—I don't believe it applies to the objections you made, Mr. Tilden, on the representations.

The COURT.—Well, you both seem to agree that this question is objectionable.

Mr. TILDEN.—It is certainly rebuttal of the testimony of Mr. Terwilliger.

Mr. STODDARD.—The testimony of Mr. Terwilliger, as I recall it, and the objections made by counsel, was upon the representations, particularly with reference as to ability to get renewals of the lease, and the confidence that Mr. Terwilliger had in Mr. Dunfee. The testimony now is that Mr. Dunfee went into the proposition on the supposition that Mr. Terwilliger was going to raise the money, and the contract sets forth very clearly what Mr. Terwilliger was to do as far as raising the money was concerned.

The COURT.—You cannot vary the terms of the written contract subsequently entered into. Put it in over the objections or not, just as you like; but I don't think I shall consider testimony of that kind

(Testimony of J. W. Dunfee.)

to modify the terms of the contract. [211]

The WITNESS.—(Continuing.) When Mr. Terwilliger came up in January, 1917, I believe he went down into the property. It was at that time that retaining Mr. Edwards as director was discussed. Mr. Edwards protested against acting as director. On the 1st day of August, 1918, there was a great deal of ore in sight in the mine and I was working on the 600-foot drift, driving southeast in the hope of finding ore. I afterwards mined out all of the ore—the commercial ore—then in sight, something like $2,000.00 or $3,000.00 net to the company. After I had mined that ore out there was no more commercial ore in sight. Prospects of developing further ore were good. Referring to the testimony of Mr. Terwilliger and Mrs. Terwilliger to the effect that I was in Goldfield before their trip to Hornsilver about the 1st of August, 1918, the fact is I was not in Goldfield on the occasion of that visit. They arrived at Hornsilver about four o'clock in the afternoon. They said they had to make Big Pine that night. They brought Judge Edwards along to have a conference with me. They all went into the office and brought out a paper which had been prepared by Judge Edwards, the August 1st report. It was made out in Goldfield and brought out to me to sign. After reading it over I kind of hesitated a little, wanted to have a further talk with them to see if this was the policy that Mr. Terwilliger and Judge Edwards had signed; so Judge asked Mr.

(Testimony of J. W. Dunfee.)

and Mrs. Terwilliger to leave the office and he would have a talk with me, and explain things to me; so they went out and we talked a bit, and I asked the Judge if this was what they decided on, and he said yes, he thought it was best; and I said, "If that is what you decide on, I will sign the report," and did sign it, then he called them in and Mr. Terwilliger was in a great hurry to get the report in his pocket, and he went out and got in the car and left for Big Pine, and said he had to make it. The entire visit of the Terwilligers at Hornsilver at that time didn't cover over [212] fifteen minutes. Nothing was said at that time as to my intention of closing down unless it was if we ran out of money we were to close down, and the mill quit working, and I would have to close, I told them that. The mill was supposed to close in September of that year but they kept on running until the last of October. Our treasury was very low; I didn't have enough money at that time to meet that month's pay-roll. There was nothing discussed exactly as to closing down; we were talking of future work. It was after that that I extracted this small amount of ore still in sight—that is $2,000.00 or $3,000.00. I recall receiving Mr. Terwilliger's letter of September 30, 1918. At that time the mine conditions were, all the ore was mined out; I had taken this ore in order to meet the pay-rolls and there was practically no ore in sight. I was really in debt at that time, the company was. I closed the mine down on account of no money to work the property, I had to;

(Testimony of J. W. Dunfee.)

in order to meet the pay-roll I had to go up the shaft to the 350, and take ore out from around the shaft, to meet my pay-roll. That was bad mining and I afterwards had to fix it up. After closing down the mine I made a report, the report of November 6, 1918, that has been introduced here. I recall its contents. It correctly states the mine conditions and prospects at that time—accurately. After meeting Mr. and Mrs. Terwilliger at Hornsilver in August, 1918, I next saw him in July, 1921, in Goldfield between the 25th and 30th. I corresponded with him between the time of closing down of the mine and this date that I have just given. I can recall some four or five letters that I wrote. They have all been introduced in evidence except one or two I think haven't. There was one in April that I wrote him, 1919; and there was one on the 2d day of March, 1920. Referring to the statement in the August 1, 1918, report that "the present conditions of the mine are good, we have uncovered a fine body of ore, running $45.00 to $50.00"—that is the body of ore I had in sight at the [213] time Mr. Terwilliger was in Hornsilver, at that time. That was on the 600-level in the winze going down. That is the body I have said that I exhausted before I closed down—a portion of the $2,000.00 or $3,000.00.

Mr. STODDARD.—(After search.) I find a copy of a letter dated April 12, 1919, from Mr. Dunfee to Mr. Terwilliger; we have no copy and have no

(Testimony of J. W. Dunfee.)

original dated March, 1920, except the letter dated March 26, 1920 (already in evidence).

The WITNESS.—(Continuing.) This (referring to letter dated April 12, 1919, produced by Mr. Stoddard) is not the one I refer to as one of the letters I wrote in April, 1919. I did not retain a copy of that letter; wrote it just in long-hand. It stated in effect we had to get to work on the Orleans property, as he knew we had to do sixty shifts by the last of May if we expected to hold our lease; that there was no money in the treasury, that we had to raise money, and I had paid up back bills, and the company was already indebted to me in the amount of $400.00. That is practically all that I remember of the letter. I did not keep a copy of the March 2, 1920, letter. I have since seen it in the possession of Mr. Atkinson after Atkinson became Mr. Terwilliger's attorney. In it I was telling Mr. Terwilliger if he would come up we would get a new lease, but we would have to get to work, and I haven't talked the terms of the lease with Judge Edwards, but just stated we would take a new lease, and for him to come up; and after I had talked the terms over with Judge Edwards, he said he would give us a 2½ years lease if Mr. Terwilliger would come up and go to work, but that we could not bluff any longer, we had to go to work. Then I notified Mr. Terwilliger of that in my March 26th letter. His answer to the March 26th letter dated May 2, 1920, is the last communication I ever had from him. After the closing

(Testimony of J. W. Dunfee.)

down of the mine I went to Mokelumne Hill in California, had an option on a mine there; [214] and then I went back to Goldfield and sent a party to New York to try to buy this Mokelumne Hill mine; went out to Divide and located some claims in January, and then with other associates there we organized three companies in Divide—worked the properties there—then I went to Candelaria and bought into the Georgina mine, and during the fall months I was in Candelaria sampling and surveying the property, doing a little work; and then I went back to Goldfield in the fall, and stayed a couple of months, and then back into Candelaria in the spring of 1920 and made thorough examination and assay from that Candelaria property in January and February, did some work prospecting.

The COURT.—Does this have any bearing?

Mr. TILDEN.—Just to show that he was not engaged in the business of the corporation. (To the witness.) How did you come to take the June 5th, 1920, lease?

(A.) Well, we could not get any satisfactory letters from Mr. Terwilliger, nothing of the kind, and the lease had run out, it had been cancelled a year before that.

The WITNESS. — (Continuing.) The circumstance that led up to my taking the lease was, Judge Edwards asked me if I would take a lease on it and go to work. I wanted to test—wanted to do some work on the 300-foot level. I went to work about a week or ten days or two weeks after taking

(Testimony of J. W. Dunfee.)

the lease. At first I employed a Mr. Burke and Mr. Mitchell as miners, and I was working myself. I was paying Burke and Mitchell out of my own pocket. I worked them until Mr. McMahon (previous witness) was about to buy the lease in July, then we closed down for while; these two men and I worked about two months and a half and that took me up to the time Mr. McMahon came to examine, and I did about twenty days work at that time. After Mr. McMahon had been there I continued the work with Burke and Mitchell for the balance of the terms of two and a half months—that is the idea I desire to convey; [215] two and a half months all told. That was all at my own expense and I was working myself, sharpening steel and going down the mine. After I closed down in August of that year—1920—I made a trip to Los Angeles with the view of financing the whole camp. That was the last of August, 1920; then the 2d day of January, 1921, I went back and went to work alone in the mine. I hadn't been there from the last part of August until January 2d of the next year, 1921. The result of my work with Burke and Mitchell was nothing, we found no ore. I did 137 feet of work. When I returned in January I went to climbing the shaft and worked all alone at the 600-foot level; I first drove in a drift about ten feet on the 600-foot level at the point where the Orleans Mining & Milling Company left it. That is southeast of the line drawn by Mr. Downer on the map in evidence. The June, July and August, 1920, work was on the

(Testimony of J. W. Dunfee.)

350-foot level. I didn't start on the 600-level until I went back alone in January, 1921. I worked two months and sixteen days alone on the 600-level, except one man worked about five days with me during that time. He worked at my expense. I did at that time while working alone about 70 feet of work. Sometimes I had to go up and down the shaft twice a day; worked until eleven o'clock at night; got up early in the morning, and after the showing got to be good, got in some low-grade ore, I would come back on that night and stay until eleven o'clock. That carried me up to the 15th day of March, 1921. I then had some ore in sight; thought I could pay the men if I put them on, so I arranged for Joe Vernon, Andy Krion and Westfall to muck out the ore that I had stored in there; I had the drifts stored full; could hardly get in there, and worked 18 days, taking chances for their money of my getting out a shipment of ore. I also told them that if they didn't get the shipment out I had a life insurance I would put up; they would be sure of their money if they would just give me a [216] little time. While they were mucking I was running the hoist. After they got the muck out I had to drift about 30 feet where I had found the ore in an incline upraise into the hanging-wall side of the vein. (Witness indicates point on map, pointing to line made by Witness Downer.) It does not appear on this map except by that portal to which the Downer line runs. (Witness marks letter "c" on the plat to indicate southeasterly work.) Then

(Testimony of J. W. Dunfee.)

I raised about 12 feet into the vein, on the incline, then drifted about 8 feet in the vein up there in that cross-cut, and then at the end of that I raised up, and there is where I got the ore, about 8 feet. That was the first ore that looked like pay ore that I got after I took the second lease. I did this working there alone, this gopher hole. It was afterwards that I employed men to muck and they mucked out, and I drove a drift under this other work. I went ahead with the work, kept on drifting southeast, underneath the work I last described on the map, about 130 feet all told. That took me to the end of the cross-cut as indicated on the map. That is 130 feet from where I commenced near the Orleans Mining & Milling Company stope. That is 130 feet from the Downer line on the map. My first carload of ore brought in about $234.00; it didn't pay; just able to buy my powder and gasoline and keep on working. I got out the first carload of ore about the middle of April, 1921, and then I gave an option to the Tonopah Mining Company and we didn't do any work for about three weeks. I spent all the time then sampling the mine, and running the hoist, while Mr. Carper, who represented the Tonopah Mining Company, and the force of men were sampling the mine. I do not know where Mr. Carper is. He was in Utah the last time I heard from him. The Tonopah Mining Company spent about five weeks all told sampling the property. They sampled it in ten-foot blocks; where there were indications of ore, took some 334 samples. This was

(Testimony of J. W. Dunfee.)

in order to see whether [217] or not they would purchase the property. Their work took into about the middle of May, 1921. After they told me they would not pay any money down for the property, I got my men together again and went back to work at my own expense, and I had no money to pay them, and I told them they had to take chances on the ore or my life insurance for this money and they all agreed to. I worked myself and continued working myself continuously until I sold out to Mr. D'Arcy. After I got in where I began to take out ore I had 5 or 6 men. I shipped about $5,000.00 worth of ore before I closed with Mr. D'Arcy. This ore netted me about $5,000.00, the ore I shipped, but it didn't pay out all bills and back things I owed for operating the mine on my own account. I was still in debt about a $1,000.00 when I sold to Mr. D'Arcy. I did not at any time after closing down the lease of the Orleans Mining & Milling Company, or before its closing down, practice any concealment of any kind toward Mr. Terwilliger or anybody connected with the company. There was large publicity attached to the work I was doing in the spring of 1921. The "Goldfield Tribune" was publishing large and conspicuous articles about the mine and the new find, and of the mining deals, that people were trying to get options. They got information for those articles from people that came to Hornsilver to look at the new find I had made; they had thought the camp was dead, and they came in sometimes fifteen cars a day, to look at the showing. I did not tell

(Testimony of J. W. Dunfee.)

Mr. Terwilliger and his wife, or either of them, at Hornsilver, "just leave this to me and I will make you all rich."

Q. When you took this lease of June 5, 1920, what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger [218] or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

Q. What reason had you to think that?

A. From the letters that had transpired between us, and I told him he could get a lease, and he would not come up, we had to see Mr. Edwards first, and show him we would be able to work the property.

Q. Was there ever any discussion between you and him as to what you should do and what he should do in the enterprise? A. Yes, sir.

(Testimony of J. W. Dunfee.)

Q. What was it?

A. He was to finance it, and I was to look after the mine; I was to find the ores.

Cross-examination by Mr. STODDARD.

I saw a good deal of Terwilliger in Rawhide; we lived and batched together in the same tent for about a month. We were very good friends. My meeting with him in Los Angeles at the time this deal was made was accidental. I knew he was living there. After entering into the contract with him I returned to Hornsilver. The property operations of the Orleans Mining & Milling Company commenced some time in September, 1916. I was the president of the company, its general manager and acting treasurer, and one of the directors. I was the treasurer designated by the board of directors. [219] Mr. Edwards didn't want to act as a director, and we put him in to act temporarily until we got organized, in September, and then when Mr. Terwilliger came up in January we induced him to continue on in that capacity. Mr. Terwilliger's first appearance in Goldfield was in January, 1917. Mr. Edwards told us that he would have to act first for his company, and when there was any trouble came up he would have to take his company's part, and at all times could not act in our favor maybe, and we told him we would take our chances on his honesty to give us a fair deal. That conversation occurred in Edwards' office between Mr. Terwilliger, Edwards and myself in Goldfield.

(Testimony of J. W. Dunfee.)

(Letter is identified by witness, heretofore marked Plaintiff's Exhibit No. 17, and read by counsel:)

PLAINTIFF'S EXHIBIT No. 17.

"GOLDFIELD HOTEL,
Goldfield, Nev.

Sept. 15, 1916.

C. A. Terwilliger,
Los Angeles.

Friend Call.

I haven't received the stock books yet. E. Carter Edwards Attorney at Law will act as sect. for our Co. He is a attorney at law and will come in handy and is square. Hope success to you as I feel like we both made a deal where we will clean up a bunch of money. Will have maps and reports made first of week next.

J. W. DUNFEE."

The WITNESS.—(Continuing.) Mr. Edwards said he would act for us till we got going, till we got our money, to see whether we got this money that Mr. Terwilliger was to put up, he would act on the board. A thousand and one shares of the Orleans Mining and Milling Company stock were issued to him so he could act as a Director of the company. I was in Goldfield in September 15, 1916, the date I wrote that letter, and had a talk with Edwards on that date [220] about his acting as secretary. I did not issue him a thousand shares of the treasury stock on that day. I never

(Testimony of J. W. Dunfee.)
remember signing the certificate; I remember signing certificates, and Edwards getting the stock.

(Witness is shown stub in stock-book for Certificate No. 69, showing the issuance of 1,000 shares to E. Carter Edwards on September 20th, 1916, and that the shares were transferred from the treasury stock.)

The WITNESS.—(Continuing.) I signed that certificate. I was also treasurer of the company at that time. I did not as treasurer receive any consideration for that 1,000 shares certificate. This must have been filled out by Mr. Terwilliger in Los Angeles because that is his handwriting; the books were sent back to me.

Mr. TILDEN.—Counsel has consented that I break in at this time; I forgot to ask Mr. Dunfee about the surrender of the second lease.

Q. There were three leases altogether were there not, Mr. Dunfee? A. Yes.

Q. One under the Leasing Company, one you took June 5th, 1920, and then the one of January 1, 1921; now what did you do with the lease of June 5, 1920?

A. Why, I surrendered it, turned the lease in to Judge Edwards about October, 1920.

Q. Why?

A. Because I could not keep up my sixty shifts a month any longer, I handed back the lease.

Q. How did you come to enter into the lease No. 3, the one of January 1, 1921?

(Testimony of J. W. Dunfee.)

A. At his solicitation that I go down and try it again; so I told him that I would go down and do about 70 feet of work, and see whether I wanted the lease or not; we didn't draw up the [221] lease; so I went down—

Q. And that is the 70 feet of work you have described?

A. Yes. So I went down and went to work all alone to do that 70 feet.

Q. That is how the lease came to be dated back as explained by Mr. Edwards? A. Yes.

Cross-examination Resumed by Mr. STODDARD.

The red line drawn on the plat by Mr. Downer indicates where the Orleans Mining & Milling Company quit work. Referring to the 600-foot level all of the work lying east of the Downer line was done by the Orleans Mining & Milling Company up to the point about 187 feet from the Dunfee shaft. I worked on this property in some capacity or other since 1913. It was owned by the French Company. I do not know the principal shareholders of the French Company. I did not have friendly or confidential relations with the owners during the time that I was upon that property. I did not know any of them except a Mr. Charra, who came there and stayed about a month and a half. I was employed to go upon the property by Mr. Charra who was one of the owners, but he was dead at the time I took the lease. He was the only one of the company that I knew. He died the first year of the war. I did not have any corre-

(Testimony of J. W. Dunfee.)

spondence with the French Company. I did not personally write or telegraph to Paris or to any representative of the company for a lease or an option. I took such matters up with Judge Edwards. I might have passed one or two letters of a friendly nature with them in the early fall.

Q. Did Mr. Edwards at any time subsequent to the 25th day of July, 1918, assure you that the lease, which would expire on May 31st, 1919, would be extended if you desired?

A. It would be extended if we would go to work, yes. [222]

Q. Did he make this a qualification?

A. Yes, sir, he did.

The WITNESS.—(Continuing.) It is not a fact that Mr. Edwards stated to me that that lease would be extended, or gave me his verbal assurance that it would be extended, regardless of whether or not I went to work, until May 30, 1920. Mr. Edwards did not at any time during the latter part of 1918, say or represent to me that the excess shifts performed by the Orleans Mining & Milling Company would be credited on an extension of the lease. I testified on direct examination that in the fall of 1918 there was not much ore in sight; that I was at that time driving southeast on the 600 level in the hope of finding ore; I was driving southeast right up to the 6th day of October, 1918. I had hopes of striking a rich body of ore; that was why I was driving a drift. The location at which I did strike a rich body of ore in the spring or early

(Testimony of J. W. Dunfee.)

summer of 1921 was the extension of this drift, in the same direction I was then going. I drove 44 feet further in that drift before I got good ore, shipping ore. The statement in Plaintiff's Exhibit No. 3 which is a statement signed by myself as president and Mr. Terwilliger as vice-president and Mr. Edwards as secretary, "the present prospects of the mine are good, as on the 600-foot level after encountering some rather bad luck in the 400 and 500 foot levels in finding a leached-out condition and ore of so low a grade as hardly to bear treatment under present conditions, we have uncovered a fine body of ore running from $45.00 to $50.00 per ton in the better class of it, with a large amount of ore of $15.00 to $25.00 per ton," is true. It is also true, as I have heretofore stated, that the rich ore referred to in this statement was extracted by me between August 1st and the 6th day of October, 1918, when we closed down. I removed all of that ore that I could remove at a profit by underhand stoping it. I also extracted at the same [223] time what I referred to in this statement as the larger amount of ore of $15.00 to $25.00 per ton. All of it was extracted except in the bottom of the winze.

Q. Then there was still evidence of the larger amount of lower grade ore, is that true?

A. There was still some ore in the bottom of the winze.

The WITNESS.—(Continuing.) As to mining conditions at that time, referring to the fall of

(Testimony of J. W. Dunfee.)

1918, labor was very poor. It was difficulty to get satisfactory or competent labor at all. Such labor as I could get was very high. I was paying $5.00 and $5.50 a day at that time. That was more than I had formerly paid. All of the operating expenses were much higher in the fall of 1919 than at any time previous. That is not the reason why the property closed down. The reason was that we had no more finance to work on.

Q. And the reason you didn't have any more finances was on account of the difficulty in financing any mine property at that time, wasn't it?

A. Difficulty of financing, and had no more ore to ship.

Q. Isn't it true that it would have been a sacrifice of the low-grade ore to attempt to work it under those conditions; in other words, isn't it true, if you had been able to go ahead and take out the low-grade ore, that your return would have been much less than if you had waited until conditions had been stabilized and normal?

A. There was no ore I could muck at that time, muck up in the mine and pay operating expenses.

Q. Referring to your report, signed by yourself as president or general manager, dated November 6, 1918, and addressed to the stockholders and C. A. Terwilliger, I call your attention [224] to the third paragraph of the statement where you say: "would recommend sinking shaft to 700-foot level to get in new body of ore"; now what body of ore did you refer to?

(Testimony of J. W. Dunfee.)

A. I referred to the ore in what I called the winze stope on the 600.

The WITNESS.—(Continuing.) This winze stope is not the southeasterly drift. That drift was in a drift where we had turned and gone north, where we cross-cut over to the vein, and turned and went north, drifting north with reference to the Dunfee shaft on the 600. It was almost directly over the Dunfee shaft. At the time I closed down the body of ore I refer to was remaining in the property, in the west drift on the 600-foot level.

Q. Calling your attention to that statement where you said: "The visible ore in the mine except as above indicated has been pretty well *well* worked out in the different levels, and the success of the mine in the future will require proper development to disclose the ore bodies that diligence and perseverance will no doubt discover." What ore bodies did you have in mind or the possible or approximate location of ore bodies, that diligence and work would discover at that time?

A. That is when I recommended the sinking of the shaft; I had in mind by sinking this shaft to get under this ore on the 600, what I called the underhand stope on the 600, that is why I recommended sinking the shaft for that body of ore.

Q. Do you know why that recommendation was not followed?

A. There never was any money to do this work.

Q. And the reason you could not raise the money

(Testimony of J. W. Dunfee.)

was on account of the financial conditions of the whole country at that time; is not that correct? [225]

A. There was never any money raised to go to work; the lease expired.

The WITNESS.—(Continuing.) I was not in Goldfield at any time during the period that Mr. and Mrs. Terwilliger testified as to having been there from the 31st of July to along about the 4th of August, 1918. I am positive of that. As to whether I was in Goldfield during the latter part of July or any time near the dates mentioned, I don't remember; I would drive in and out at night. Many times I have driven into Goldfield, remained a few hours, and driven right out again; many evenings. I did see Mr. and Mrs. Terwilliger at Hornsilver during that time. It was just as the shift was going off. I was coming from the mine and saw a car drive up and stop at the office. Mr. and Mrs. Terwilliger and Judge Edwards were in the car. We all shook hands and spoke of the mine. I told them of the work I was pushing to get done. I talked of the operation of the mine and Mr. Terwilliger informed me it was late and he had to make Big Pine that night. They stated that their purpose in coming there was to get the report made out at Goldfield signed. They had a copy with them. I think Mr. Terwilliger handed it to me, and I read it. My action showed that I did not exactly approve of it, and Judge Edwards asked Mr. and Mrs. Terwilliger to let him have a talk with me about it.

(Testimony of J. W. Dunfee.)

That was in the office. Mr. and Mrs. Terwilliger stepped out and Edwards and I talked there and we went ahead talking of this matter and other matters. Just a few words was said about this report. He said this will be the best policy, he wants to show it to the stockholders, and wants you to sign it, and I signed it, and Mr. Terwilliger came in and took it. He didn't state what would be the best policy. I read the statement before I signed it. I noticed in it the following: "The Owning Company has given its consent in writing directing Mr. E. Carter Edwards [226] to extend the lease for another year, that is to June 1, 1920, which will be done." I read that. Nothing was said by Mr. Edwards to me while we were alone in the office about the extension of the lease—not a word.

Q. As a matter of fact, did you question or doubt the fact that the lease would be extended?

A. I knew it would be if we kept working.

Q. Now you knew when you signed this statement on August 1st, 1918, that the company didn't intend to work, didn't you?

A. I don't think I did know; I thought we were going ahead and work as long as we could; I knew if we ran out of money we would have to quit, but I was in hopes of finding ore to keep on working.

Q. Didn't you in this declaration to the stockholders signed by you state that the company was going to close down, or words to that effect?

A. If the mill closed; yes.

(Testimony of J. W. Dunfee.)

Q. Let me call your attention to this statement, after referring to war conditions: "It is easily seen, that the present in not the time to enlist capital for any other than a government or war purpose, for we must be patriotic above all other things and first help the Government to win the war. This is our slogan." Now, wasn't it the intention at that time to close down the property of the Orleans Company?

A. It was not the intention, sir, regardless of what that says.

Q. Is this statement true? Are all the statements contained in this statement true?

A. It is practically true; it was the slogan of the company; it was got up by Mr. Terwilliger and Judge Edwards; I wasn't present, knew nothing of it until they showed it to me. [227]

The WITNESS.—(Continuing.) The statement covered the situation. The statements with reference to the mine are all true. I see nothing wrong with it. There in regard to where the company had always paid their bills, I had always assumed that responsibility myself; everything was left to me; that was one statement that was not true. I had to pay the bills that the company was short, had to make good any work, bad work that was done; I was standing personally back of the company. Once or twice I had to make bills good. Those payments were refunded to me except the last. Several letters, four or five, were exchanged between me and Mr. Terwilliger in 1919 and 1920. I think that all with the exception of two have been introduced in

(Testimony of J. W. Dunfee.)

evidence here. I didn't make a copy of the letter that I wrote in April, 1919, to the effect that we would have to go to work or the Orleans Company would have to go to work to preserve their lease. The substance of that letter was that Judge Edwards would cancel the lease unless we went to work on June 1st, 1919. That letter was written in April, 1919, or May, right in there. I don't remember what else I said in that letter; it was notifying him that we must go to work is all, and the reason why we must go to work. That letter was not written in reply to any letter from Mr. Terwilliger but was written by notification by Judge Edwards; I met the Judge that day, and he told me that we had to go to work. That conversation was in his office at the time I wrote this letter to Terwilliger either in April or the first of May. At that time Mr. Edwards said that he wanted to know why we were not getting to work, wanted us to go to work on our lease, and he said, "I will have to cancel"—he said, "I will let the lease run out, the lease will run out on that date unless you get to work"; that was about the effect of the talk. That is why I wrote a letter to Mr. Terwilliger; Judge Edwards asked me to notify him, or I don't know whether he [228] asked me to notify him either; but he was telling me that he had heard from Mr. Terwilliger. Mr. Edwards told me of a letter to be written to Mr. Cooke regarding this suit prior to March 16, 1922. I had that conversation I guess in April, 1922. I have read that letter since then. Mr. Edwards discussed it with me be-

(Testimony of J. W. Dunfee.)

fore he sent it. The letter that I wrote Terwilliger warning him that we would have to get to work was not in answer to a letter already in evidence dated April 9, 1919. I received the latter letter but had already answered it. I had answered all letters he wrote me. I knew when I wrote that letter that Mr. Terwilliger had requested me to get together with him or meet him in Los Angeles as to the financing of the company. He had requested me in one letter to come. I also wrote a letter under date of March 2, 1920, to Mr. Terwilliger which has not been introduced in evidence. I wrote and told him we could get a lease, but didn't tell him for how long, or the terms, or anything of the kind. That was about all, and for him to come up. I had a conversation with Mr. Edwards about a new lease. This first letter was an answer to Mr. Terwilliger's letter; then after I had a talk with Edwards, without waiting for another letter, I wrote Mr. Terwilliger a letter March 26th, I believe the letter showed it, I don't remember the dates, telling what kind of a lease we could get, 2½ years and 20%. That is the letter of March 26th in evidence. I had no conversation with Mr. Edwards prior to March 2d about the extension or renewal of the lease. He said he thought if we could get money, he would think favorably of a new lease. Later on I had a talk with him and he informed me what he would do and I notified Mr. Terwilliger in the March 26th letter. It was in March, 1920, that I talked with him about the new lease. I hunted him up and

(Testimony of J. W. Dunfee.)

showed him a letter from Mr. Terwilliger written the last days of February. I could not promise Mr. Edwards anything, that we could [229] really get the money to go ahead, so he said if we had any money to go ahead with the lease, he would not mind granting a new lease; so I wrote Mr. Terwilliger and told him to come up, and we would have a talk with Mr. Edwards, and assure Mr. Edwards what we could do, and he would give us a new lease. He would give us a 2½ year lease if we would go to work doing sixty shifts a month, something like that; we had to get to work on the property, but he would not give us a lease unless we went to work, and it was financed. I knew that Mr. Terwilliger had written me letters asking me to come to Los Angeles. I did not want to start on an entirely new basis, just take the old company and go on. What I meant in my March 26th letter when I said, "Do you think you could take the old company and get money by selling stock to work it; we would start out on a new basis; I got wise to the stock game," was for him to go out and sell stock to help the property.

Q. What did you mean by "start out on a new basis, I got wise to the stock game"?

A. I had always made my effort to make mines pay that I worked in; I found out that the stock game that Mr. Terwilliger was playing was the best place to make the money; I had never been in the game before, I always made mines pay when I worked them.

(Testimony of J. W. Dunfee.)

Q. What sort of new basis did you want to start out on, that you refer to in this letter?

A. Let Mr. Terwilliger go out and sell stock.

Q. Was that a new basis?

A. Well, that was the old basis.

Q. I am asking you what you meant by starting on a new basis?

A. Perhaps not to put every dollar in the mine, like I had always worked; I would let him have money to go sell [230] stock, which he had always requested of me; that is what I meant by new basis—let him go out in New York and sell stock.

The WITNESS.—(Continuing.) In December, 1918, I went to California and then to Divide in 1919. First went to Divide in January, 1919. I was not on the Orleans property until June, 1920. I first had a conversation with Mr. Edwards about the June 5th, 1920, lease on May 2d. I had a conversation in regard to Mr. Terwilliger not responding. I base that statement on the contents of the May 2, 1920, letter. Edwards and I were talking that over, that he would not come up. We discussed the fact that he thought Mr. Terwilliger would not be up, and when I asked him to come up we could not get a lease unless he came up and agreed to finance it, that Edwards would not give us a lease, that he could not give a lease unless Mr. Terwilliger arrived there and assured him we would go to work and do development on the mine, and we discussed that letter in that light. I don't remember anything further about that conversation.

(Testimony of J. W. Dunfee.)

Q. Was there anything said about your getting a lease on that property?

A. He stated that he would give the lease to anybody that wanted it; I don't remember anything said to me.

Q. Didn't you ever have a talk with Mr. Edwards prior to the June 5th, 1920, lease about the giving of that lease?

A. Yes, he stated he would give a lease to any party that wanted a lease.

The WITNESS.—(Continuing.) Our conversations all happened after Mr. Terwilliger would not come up on that lease; we had several conversations there. The conversation about the June 5th, 1920, lease was around the first of June. Mr. Edwards said that Mr. Terwilliger wasn't going to do anything and he said, "Why don't you take a lease and go out there?" That was practically all that [231] was said, that was the main conversation, and we discussed if I thought *if I thought* I could find ore. After I went upon the property after the June 5th, 1920, lease, I operated for two or three months altogether at my own expense. I then left the property and did some work at Log Springs; first went to Los Angeles in September, then came back and worked a month or two at Log Springs for wages and went back upon the property after that. Then I went to Candelaria and did my location work there and didn't go back to the property until January 2d, 1921. Then I worked on the property off and on from January 2d, 1921, until July 18th, 1921,

(Testimony of J. W. Dunfee.)

the date I entered into the contract with Mr. D'Arcy. During all that time my gross expenses amounted to about $5,000.00 or $6,000.00, in mining and operating that property. Then credited against that amount is the net amount of $5,000.00 which I received from the shipments of ore.

Q. Now, what conversation, if anything, did you have with Mr. Edwards on or about January 1st, 1921, relative to the lease of June 5, 1920?

A. I turned in the lease in October of that year; turned it back, handed it back in the office, and Mr. Edwards says: "Why don't you go out and try the Orleans again?" and I said, "I have no money and could not do my sixty shifts, but I would like to do some work anyway"; he said, "You go out and do this work, and if you strike anything I will draw you up a lease"; so I went out there and I worked two months and fourteen days all alone in the shaft. Then I struck some ore and employed help. When I struck the ore I had this lease of January 1st, 1921, drawn. When I went to make the sale to the Tonopah Mining Company I wrote, they wanted to see the lease, and I wrote to Judge Edwards to send me out the lease, and he mailed it to me. The lease of June 5th, 1921, was endorsed, "Cancelled on January 1, 1921," I told him I would not work [232] under that lease. The endorsement upon that lease was actually made on January 1, 1921, the day before I left to go to the mine, and I told him I would not work under that lease, and he said he would

(Testimony of J. W. Dunfee.)

give me any lease in my name if I would only go out and go to work on the mine, that no one else would take it. During all the times mentioned in this proceeding, I knew Mr. Terwilliger lived in Brawley, and I knew he moved to Los Angeles in May, 1920, by letter. I did not know his residence number in Los Angeles. I could have located his place of residence if I had so desired. I visited his home a long time ago, in 1908. I was in Los Angeles at the time this contract was drawn, not at his home, at the hotel.

Mr. TILDEN.—If the Court please, Mr. Cooke wants to examine, and I want to ask one more question on direct.

The COURT.—You may ask.

The WITNESS.—(In answer to Mr. TILDEN.) At the time I went to work on the lease in June, 1920, the equipment was badly wrecked, not much left. The engine-room had no roof on it.

Mr. COOKE.—We object as incompetent, irrelevant and immaterial.

The COURT.—I don't myself see where it has any bearing, but if you want it in, it can go in subject to the objection.

Mr. TILDEN.—When I get to it, it will show some thousand dollars was paid to restore it.

The COURT.—It will go in subject to the objection.

The WITNESS.—(Continuing.) And part of the engine had gone; the spark-plugs and the exhaust-head of the engine was gone, the gasoline-

(Testimony of J. W. Dunfee.)

tank had been taken, and also the water-tank was taken, and also the foundation to the water-tank was gone; the [233] forge and blacksmith tools were all gone; no blower. I restored them all. With respect to the condition to the shaft, where I had taken out that last, especially the last two days, had caved in, and I had to catch that all up before I could get down to the shaft, to the 300. It cost about a $1,000.00 to do all that work, to get the shaft in shape and get into the mine again. I spent that in June, 1920, and then had only about $200.00 left for operations on the mine. I have the checks showing the amounts paid to Mr. Terwilliger. They total $920.00, and then 200 shares he sold to Mr. Winkler who paid $100.00; makes it $1,020.00. The money represented by these checks embrace all the moneys due Mr. Terwilliger, except the Winkler account. About $500.00 of this was advanced for several trips to Goldfield from Los Angeles made by Mr. Terwilliger to attend meetings. There was one of $500.00 for a trip he made thru California trying to sell stock.

(The checks are admitted in evidence, subject to plaintiff's objection, marked Defendant's Exhibit "L," and are as follows:) [234]

DEFENDANT'S EXHIBIT "L."

94–16.

No. ——.

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, Feb. 15, 1917.

Pay to C. A. Terwilliger or order.....$100.00

One Hundred no/100 .....Dollars

Trip to Goldfield. J. W. DUNFEE,

Pres. Orleans M. M. Co.

[Endorsed]:

C. A. Terwilliger. (Paid.)

94-16

No. 47

(N. P. 16-1)

JOHN S. COOK & CO., BANKERS.

Goldfield, Nevada.

Goldfield, Nevada, April 17, 1917.

Pay to C. A. Terwilliger or order.....$100.00

One hundred no/100 .....Dollars

ORLEANS M. & M. COMPANY.

By J. W. DUNFEE,

Not over One Hundred President.

$*L*00$

(On Margin:)

Trip to Goldfield.

Orleans M. & M. Company.

Mines at Hornsilver, Nevada. (Paid.)

[Endorsed]: C. A. Terwilliger.

Pay to the Order of any Bank or Banker Apr. 26, 1917.

Farmers & Merchants National Bank. 18-1. Los Angeles, Cal.

Pay to the Order of any Bank, Banker or Trust Co. Prior Endorsements Guaranteed Apr. 25, 1917.

American State Bank. 98-820. Brawley, Cal. 90-820. W. M. SMITH, Cashier.

94-16

No. 70

JOHN S. COOK & CO., BANKERS.
Goldfield, Nevada.

Goldfield, Nevada, May 11, 1917.

Pay to C. A. Terwilliger or order.....$200.00
Two Hundred no/100 .....Dollars

ORLEANS M. &. M. COMPANY.
By J. W. DUNFEE,
President.

Not Over Two Hundred
200

(On Margin:)

Expense.

Orleans M. & M. Company,
Mines at Hornsilver, Nevada.

[Endorsed]: C. A. Terwilliger. [235]

94-16

JOHN S. COOK & CO., BANKERS.
Goldfield, Nevada.

Goldfield, Nevada, May 16, 1918–No. ——

Pay to C. A. Terwilliger or Bearer.....$500.00
Five hundred no/100 .....Dollars
ORLEANS M. M. CO.
By J. W. DUNFEE,
Pres.

Expenses. (Paid.)
[Endorsed]: C. A. Terwilliger.

94–16

JOHN S. COOK & CO., BANKERS.
Goldfield, Nevada.
Goldfield, Nevada, May 18, 1918.

Pay to J. W. Dunfee or Order.....$20.00
Twenty no/100 .....Dollars
ORLEANS M. & M. COMPANY.
By J. W. DUNFEE,
President.

Money lent to C. A. Terwilliger cash.

Orleans M. & M. Company; Mines at Hornsilver, Nevada. (Paid.)

[Endorsed]: J. W. Dunfee.
M. W. Mitchell.

Cancelled Checks *av*anced to C. A. Terwilliger by J. W. Dunfee.

Feb.	15th–1917.....	$100.00
April	17th–1917.....	100.00
May	11th–1917.....	200.00
May	16th–1918.....	500.00
May	18th–1918 cash.....	20.00
	Total.....	$920.00

To John Winkler $100.00 (For selling stock.)

[236]

(Testimony of J. W. Dunfee.)

Cross-examination Resumed by Mr. COOKE.

Q. You said in your direct examination, as I recollect, that the last lease of the Orleans Mining & Milling Company had on this property expired May 31st, 1919? A. The judge cancelled it; yes.

The WITNESS.—(Continuing.) I don't know how he cancelled it; he told me we had to get to work, that he would cancel the lease unless we went to work on that date. In a talk with Mr. Edwards prior to May 31st, 1919, he notified me we would have to go to work, or he said that he would let the lease run a few weeks, and we must be to work at that time. If we didn't go to work we would cancel the lease. I do not remember how many of those conversations I had with him prior to May 31, 1919; maybe at various times. Every time I received a letter from Mr. Terwilliger I took it up and had a conversation with the Judge. These conversations occurred in his office. In April, 1919, and then we had a discussion in January, 1919. The discussion in April, 1919, was in the latter part of the month, which time I fix from correspondence I remember coming up here in evidence in regard to some of Mr. Terwilliger's letters asking me to come to Brawley. I think it was an earlier letter than May 2d. I don't recall that he asked me in an earlier letter. It was just before or after receiving the letter asking me to come to Brawley that I had the talk with Mr. Edwards in his office, along that time. The Judge and I were alone. I brought the letters in; he was asking me when we were go-

(Testimony of J. W. Dunfee.)

ing to start up, and I said I didn't know if we were going to do any work, or what I heard from Mr. Terwilliger. I can't recall what letter it was that I showed Mr. Edwards. Edwards told me he would let the lease run till the first of June, 1919, and unless we started by the first of June he would cancel it. He also told me to notify Mr. Terwilliger to that effect. I did so notify Mr. Terwilliger [237] by letter along in April, 1919. That letter is not in evidence; I don't know where it is. I wrote it in long hand; I never kept copies of my long-hand letters. Wrote it in Goldfield. In it I told him that he knew our lease called for sixty shifts as well as I did, and unless we got to work the Judge would cancel the lease the first of June. I had the January, 1919, talk with Judge Edwards in the same place, his office. At that time the talk was principally in regard to letters Mr. Terwilliger had written me. He had written me a letter that he would cause me a lot of trouble, threatened to cause me trouble. That letter is not in evidence, I think I destroyed it. I got it along in January, showed it to Mr. Edwards and he answered it on the typewriter for me. The copy is in evidence. At that January conversation the subject of terminating the lease didn't come up. From the time of the April, 1919, conversation up to May 31, 1919, he talked of it a time or two later. It was about a month or two later, in his office. I can't fix the date any nearer than that—April or May. I know I gave him plenty of time; I notified plenty of time

(Testimony of J. W. Dunfee.)

so he could. I don't remember the subsequent conversations distinctly; various conversations came up about it.

Q. On the occasion of either of those conversations do you know whether this writing (referring to written memorandum on the lease, Plaintiff's Exhibit 2) was put upon this lease.

A. No, I don't; I don't know when that was put there.

The WITNESS. — (Continuing.) Judge Edwards put it there, I presume; that is his handwriting; I never saw that lease afterwards until we came into court, until this litigation was brought. The leases, from, say, June 1, 1920, down to the time when suit was brought were in the office in Goldfield, Judge Edwards' office. He was Secretary and kept the papers. I kept those among my private papers in his office. This paper ceased to be among my private papers in June, 1919. I didn't surrender the lease, [238] Nothing was being done with the property of the Orleans Company covered by this lease from June 1, 1919, to June 1, 1920; I was not on that property between those two dates. There was no machinery or personal property left there on May 31, 1919. The Orleans Company had no machinery. The French Company owned the machinery on the ground. It was covered by the lease and used by the Orleans Company. Between the dates mentioned nobody looked after it for our company. There was no one there representing the company or looking after the property at all.

(Testimony of J. W. Dunfee.)

There was someone there acting under the instructions of the French Company through Mr. Edwards. I don't know whether or not the French Company did anything with that property or were mining upon it or the like between the dates mentioned. As far as I know they didn't. In 1920, after a letter from Mr. Terwilliger in the last days of February, Edwards offered the company a more favorable lease. I first answered the letter telling him I didn't know what I could do but would see Edwards; and then after I had a talk with Edwards, he offered a two and a half year lease, said he would be able to give us a two and a half year lease, but we had to give him the assurance we were going to work. I wrote Mr. Terwilliger a letter about our conversation. As to when that two and a half year lease was to be given, I was supposed to start right in. I told Mr. Terwilliger to wire or write at once, begin at once so we could get action. The lease was also more favorable in the respect that it would provide for a 20% royalty. In my talks with Edwards in the preceding spring he would not give me as long a lease, but the same royalty less than the royalty that was provided by the lease when the Orleans Company had it, which was 26¼. When I was in Los Angeles in 1920, it was in September, the first part of September, I can't fix it definitely. I was there about three weeks, in Los Angeles all the time. I was dealing with a man by the name of Laughlin trying to form a consolidation of [239] properties. Fail-

(Testimony of J. W. Dunfee.)

ing in that I came back in October, 1920. It was in the last days of that October that I delivered the June 5, 1920 lease back to Edwards. That was after I failed to do business with Mr. Bettles; he would not take the property and I wasn't able to do my sixty shifts; so I went in and gave the lease back; it was too short a time; there were a lot of conditions he kicked on. I am sure it was not in the month of December, 1920, that I delivered back that lease. I am sure it was not December 20, 1920. When I handed that lease back I didn't have any promise from him of a new lease. The subject of whether I could or could not get a more favorable lease was not discussed between us before I handed back the June 5, 1920, lease.

Q. At the time you handed it back, whether October or December, 1920, you hadn't any thought of getting another lease on the property?

A. I had not a dollar in the world to work it with, so I had no idea.

Q. You had no idea of getting another lease, or anything further with the property? A. No, sir.

TESTIMONY OF E. CARTER EDWARDS, FOR DEFENDANT.

E. CARTER EDWARDS, called for defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

Referring to statement in August 1, 1918, report Plaintiff's Exhibit 3, "the Owning Company has

(Testimony of E. Carter Edwards.)

given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year that is to June 1, 1920, which will be done," I never as a matter [240] *effect* extended that lease because the mine shut down soon after that. Referring to the conversation with Mr. and Mrs. Terwilliger leading up to the writing of that report, Mr. Terwilliger in the afternoon came in to see me about an extension, came by himself first, and we had a talk over the matter and he wanted an extension he said for another year; and we talked over the present condition of finances in the company, and how he had attempted to finance it, and how his last attempts had failed, and how much more difficult it was to finance the proposition under war conditions, and he said, "I think you should give us an extension." I said, "Owing to the conditions I want to be absolutely fair with you people, and to give you every opportunity to make a success of this lease, and I will grant you another extension. I want everything to be in writing that I do in connection with this mine or lease and I will draw up the papers this afternoon or evening, and you come around to-morrow and I will submit it to you." There was nothing said in that conversation about applying past work on the requirements of future work. He came around the next morning and I submitted the paper which is the August 1, 1918, report, and I read it over to them—he brought his wife with him the next time—and said, "Does this paper fairly and sufficiently express our discussion

(Testimony of E. Carter Edwards.)

yesterday?" He said, "It is entirely satisfactory." I signed it and he signed it; then he said to me, "I wish you would go down to Hornsilver with me. I would like for you to explain this to Mr. Dunfee." Mr. Dunfee was not in Goldfield at that time. That was the object of my going to Hornsilver at that time—to see him. In this second conversation there was nothing whatever said about applying past work on future requirements. We went down to Hornsilver that afternoon. Mr. Terwilliger drove his own car. His wife went along. We saw Mr. Dunfee down there coming away from the mine and we went to the office building and waited for him to come up. We went into [241] the office and Mr. Terwilliger handed the report to him. He read it over and said nothing. I asked Mr. and Mrs. Terwilliger to leave the office temporarily so I could explain to Mr. Dunfee, and they did, and were out possibly five minutes, and I had a talk with Mr. Dunfee, read the report and explained it to him, called the Terwilliger's back, Mr. Dunfee signed the report and I handed a copy to Mr. Terwilliger. When Mr. Dunfee gave up the second lease, that is the June 5, 1920, lease, he said he was entirely out of funds, and he could not go on any further, could not perform the monthly shifts, could not keep his lease up. When he refused to take the third lease he gave as his reason for so doing that he had failed on the other, and the mining conditions were so hard, expenses so high, that the royalty was too high, and the lease was too

(Testimony of E. Carter Edwards.)

short a term, and he would not undertake anything on that.

Q. I don't think you understood my question. I mean after the terms had been discussed, did he give any reason for refusing to take the lease then and there?

A. Yes, he said that he wanted to examine the mine further, make some examinations, and do some preliminary work. He said he was very much discouraged and very much in doubt; he wanted to sample the mine to see if he wanted the lease or not. He said he wanted to see the property and examine it before he would bind himself again with a lease, and I gave him a verbal understanding that he could have it. I had to press on him the taking of the third lease. I wanted the property occupied and worked, and he was very much discouraged, and I pressed the matter on him, and agreed to give a reduction and another term and reduce the royalty. In the conversation with Mr. Dunfee and Mr. and Mrs. Terwilliger at Hornsilver there was nothing said about applying past work on future requirements. There was nothing said by Mr. Dunfee to the [242] effect that "you leave all this to me and I will make you rich."

Cross-examination by Mr. COOKE.

The lease that I refer to as the third lease was the one referred to as the January 1, 1921 lease.

Q. What did you say to him in regards to pressing him to take it?

A. Well, he had given up the other, and was un-

(Testimony of E. Carter Edwards.)
able to carry it on, perform the work on it, had no money, and that condition was talked about, and I said I wanted the property occupied and worked, and would like for him to go on and I would do anything I could to assist him that was reasonable; and he then spoke of the old lease that had been cancelled—the June 5, 1920 lease—and it was entirely unsatisfactory for any new operation. That June 5, 1920, lease was brought in in October, but I delayed cancelling it. I thought he might go on, and I gave him a chance. As to how I fix the time in October, I know he shut the mine down the latter part of August, is my memory, and he was around there, came in occasionally to Goldfield, and came to see me before he went away. I am sure it was in October but not of the date in October. I cancelled the lease that the company had been operating on the date recited in the cancellation written on the lease. I wrote that on there. If I didn't sign it I intended to, it is my writing. The date of the cancellation is the date of the expiration of the lease by its own terms. I intended to have my date of cancellation correspond with the date of expiration. I was cancelling the lease for nonperformance of the monthly shifts, cancelled it a day before it actually expired to exercise my right in that respect. Referring to the August 1st report and the statement "the Owning Company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1, 1920, which will be done," I refer, in

(Testimony of E. Carter Edwards.)

using the word [243] "consent," to my own consent. In using the word "writing" I refer to my power of attorney—the general power given me to attend to their business, to sign and make and modify leases. I intended that report to go to the stockholders of the company and I intended to do just what I said there I would do on behalf of the company, extend the lease, on condition; I didn't write it on the back of the lease, but I intended to comply with that agreement. I have not changed my mind about it.

Q. Did you as the attorney-in-fact of the French Company expect this (report) to be an extension of and in itself, without anything further?

A. That paper was simply contingent and conditional on war conditions, as it states in the preamble there. I wanted to act with the utmost fairness, and give these people all the chance in the world to perform their contract, and if they wanted it they could come to me at any time and say we want to put it on the back of the lease, and if I was satisfied they would perform the contract with me I would have done it. I considered to make it an absolute extension there would be something further done.

Q. Is there anything in there (the report) which conveys to them (the stockholders) the information that they must apply for an extension if they want it? A. I don't think so.

The WITNESS.—(Continuing.) I did no acts to cut off the stockholder's rights until that paper

(Testimony of E. Carter Edwards.)

(the report) had expired, that is, until June 1, 1920. Then I exercised my right for the benefit of my company. The property was dilapidated, going into decay, and it would take thousands of dollars and I must, and I did, exercise my rights positively then in favor of my company. It would have been going on until now, and I wouldn't have had no mine. The property was being stolen, the stopes had fallen in. [244]

Q. You consider that the Orleans Mining & Milling Company under this paper, Plaintiff's Exhibit 3, had rights to the property until June 5, 1920?

A. I did, and I didn't violate any rights that they could have exercised up to that time.

Q. What kind of rights do you mean that you understood they had there up to June 1, 1920?

A. The right to operate that mine.

Q. Under the old lease? A. Yes.

Q. And that is why you didn't do anything towards protecting the French Company, as you put it, by putting somebody in charge there and working until June 5, 1920?

A. Yes, practically; I had warned Mr. Dunfee to communicate with Mr. Terwilliger, and to start it up, and I had offered to give another and new lease, two and a half years and 20% royalty, to do anything I could to get mining started. It was going a long time, the mine was getting in a bad shape and I would have taken Mr. Terwilliger and his company on a new contract if they had come up and made a showing.

(Testimony of E. Carter Edwards.)

The WITNESS.—(Continuing.) At the time of the visit to Hornsilver of Mr. and Mrs. Terwilliger about August 1, 1918, I did not say to them in substance, now you go down to Imperial Valley and tell the stockholders there not to worry over this property for their investment will be protected in every way. I let the paper (report) explain everything. That paper was intended for the stockholders; that is all I did. I sent no message by Mr. Terwilliger to the stockholders in Imperial Valley except that report and since that report I never sent any notice in writing to Mr. Terwilliger or to the stockholders in regard to the subject of the extension of the lease, or the cancellation of it. I gave notice to Mr. Dunfee, didn't put it in writing, [245] but I instructed Mr. Dunfee when writing to Mr. Terwilliger to inform him of my determination; they always conducted the conversation between them; I was only nominally a director, and I left them to attend to their own affairs, but I told Mr. Dunfee repeatedly to so inform Mr. Terwilliger.

(Three letters are identified by the witness, admitted in evidence without objection, marked Plaintiff's Exhibit No. 18, and are as follows:) [246]

PLAINTIFF'S EXHIBIT No. 18.

E. CARTER EDWARDS,
Attorney at Law.
Box 1137.
Goldfield, Nevada, March 28th, 1920.

H. R. Cooke, Esqr.,
Reno, Nevada.

Dear Sir:—

Excuse delay in answering your last, but I have had to go over to Tonopah, and divide my time among some other matters as well, which accounts for the same.

We give you the following information unconditionally, requested by you, as to the amount of the stock of the Orleans M. & M. Co., issued, outstanding, and to whim issued.

C. A. Terwilliger	267,000	shrs.	Promotion
Geo. R. Drofflemyer	4,000	"	"
Mrs. Geo. R. Drofflemyer..	2,000	"	"
J. L. Taecker	6,000	"	"
H. P. Fites	2,000	"	"
T. B. Shank	4,000	"	"
G. J. Shank	4,000	"	"
Albert Lackman	6,000	"	"
Mrs. Jennie Robinson	2,000	"	"
John Robinson	1,000	"	"
Melville W. Curn	1,000	"	"
Tom Crawford	1,000	"	"
	300,000		

J. W. Dunfee	300,000	"	"
C. H. Ellsworth	2,250	"	Treasury
E. Carter Edwards	1,000	"	"
John Winkler	200	"	"
Total	603,450		

I wish to correct a statement made by me to the effect that I had only one share of stock. I was so impressed at the time of writing, but find 1000 shares in my name.

Will leave the matter to your good judgment as to how you use my letter and exhibits sent you.

Yours very truly,

E. CARTER EDWARDS. [247]

E. CARTER EDWARDS,
Attorney at Law.
Box 1137.
Goldfield, Nevada, March 20th, 1922.

H. R. Cooke, Esq.,
Reno, Nevada.

My dear Sir:

I have delayed a little longer than I desired to get before you all the facts, which the inclosed, is submitted to cover the whole situation. I had rather had a talk with you on this matter, but as that was not practicable, have tried to supply the facts, so that you will be put in an equivalent position as a conversation would have placed you.

We deny that I and Dunfee, ever kept from Terwilliger any fact that he wanted to know, or ever deceived, or tried to deceive him, and submit

the enclosures as the best evidence, from which you can draw your own conclusions.

Begging your pardon for the delay,

I remain,

Yours very truly,

E. CARTER EDWARDS. [248]

E. CARTER EDWARDS,
Attorney at Law.
Box 1137.
Goldfield, Nevada, March 16th, 1922.

H. R. Cooke, Esq.,
Reno, Nevada.

Dear Sir:

Pursuant to my promise contained in my letter under date March 12th, inst., I shall give you the facts fully regarding the Orleans Mining & Milling Co., and the business dealing had between Terwilliger, Dunfee and myself in operating the lease acquired by it from Dunfee, and the termination and ending of its rights over the mining property of Le Champ d'Or French Gold Mining Company, Limited, upon the expiration of the extension of it, and the failure of the Orleans Mining & Milling Co., or any one for it to seek an extension of it, after its said termination by expiration.

The lease was originally granted to J. W. Dunfee by Le Champ d'Or Company, by its Attorney in fact at that time J. Charra, the date of said lease being 19th day of June, 1915, and the term of the same ending May 31st, 1917, being for nearly two years. By two extensions of it the lease was extended as follows: By extension made February

25th, 1916, extended one year, to May 31st, 1918; by extension dated April 18th, 1917, one year, to May 31st, 1919. The two extensions were made by myself, who had been made Attorney in Fact upon the departure for France of Mr. Charra, in the fall of 1915, and I have remained such attorney in fact to the date of this writing. So when the Orleans Mining & Milling Co. was incorporated by Terwilliger and Dunfee, at Los Angeles, California, in September, 1916, I had charge of the affairs and business of Le Champ d'Or, Incorporated under the laws of Arizona.

My legal services were not engaged nor counsel sought in the organization of The Orleans M. & M. Co., but the services of some attorney in California, nor was I present at any meeting of its stockholders at its organization or otherwise in California, nor as well of its directors. It was the desire of Mr. Dunfee and Terwilliger at the incorporation of the Orleans M. & M. Co., to have my name proposed as a director, and I was consulted on that matter, and remonstrated at the suggestion and took the position that the duties of a director of the Company leasing and the Company Lessor, Le Champ d'Or, were inconsistent, and might require me to make choices that would not please those whom they might be against; but they did not think my objections consclusive and upon their request I was made the transferee of 2 shares of stock to qualify me, and at Phoeniz in the organization process made a director. This is all the stock interest I ever acquired in the Company, and is how I became a director. I will add this, as you may sur-

mise, that they wanted me to steer them clear of the difficulties that they knew they did not have the legal knowledge to avoid, and their judgment in this direction proved true, as I was soon engaged in rectifying what to me were very grave mistakes in their manner of raising money by the sale of stock. [249]

Before the organization, Dunfee and Terwilliger entered into an agreement providing for their respective interests in the New Company, be 50–50 interests, the amount of money to be raised to be $8000.00, the time to be given to raise it—$5000.00 first and the balance subsequently, $3000.00 to go to Dunfee, the manner of paying expenses of organization, and advanced expenses of operation, sale of stock, etc. Inclosed find a copy of this agreement which we mark Exhibit "A." You may possibly have the same, but we send along for safety, a copy of the same.

The first meeting of the directors in Goldfield was held on January 15th, 1917, at my office, and I have the minutes of this meeting, at which the directors, Terwilliger, Dunfee and Edwards were present, and I was made Secretary, Dunfee, President, and Terwilliger, Vice-President. After this meeting on January 15th, 1917, and Terwilliger had left for California, Dunfee disclosed to me that Terwilliger had proposed to him and had insisted on its execution, a secret private agreement between Terwilliger and Dunfee to the effect that the first moneys realized from the development should be turned back to the stockholders who had paid

for the promotion stock of Terwilliger to raise the $8000.00 mentioned in the original contract Exhibit "A," and that also Dunfee and Terwilliger should also be paid the sums of $12,000.00 to Dunfee and $5000.00 to Terwilliger in addition, for the purpose of indemnifying the stockholders who bought the $8000.00 of promotion stock (32,000 shares at 8¢ per share) and giving Dunfee and Terwilliger, who were to own 50–50 of the promotion stock (300,000 each amounting to 6000,000 shares, the Treasury being 400,000 shares) an unfair advantage and preference over the subsequent purchasers of stock whose sole work it was Terwilliger, to sell additional stock—in other words any possible profit they could receive as holders of stock purchased subsequent to this agreement, would be after all these preferential amounts had been first paid. Upon Dunfee's relation of this scheme to prefer the promoters over subsequent purchasers of stock, I pronounced it unfair, unjust, and a fraud on the rights of all stockholders becoming such subsequent to the execution of this agreement, and advised Dunfee that he and I must at all events, take up and cancel this unlawful agreement. We then (Dunfee and I) worked with this point in mind, that before we would license Terwilliger to sell any more stock, it would be upon his agreement and consent to rescind this unlawful agreement, and the stock being based on a lease which did not have a duration of quite 3 years (from September, 1916, to May 31st, 1919, the work being actually begun on it in the later winter of 1917) it was still

more unfair to begin complications of this character where the stock was based upon a lease only, as the expiration of the lease would turn the stock into mere paper, unless the lease was continued by extensions to preserve its life. My hunch had come true as I had secret misgivings as to Terwilliger's conduct, the same and his manner of talking and acting being rather that of an actor and impersonator, than a *bona fide* worker, being my impression of him.

To forestall the possibilities of selling stock with this agreement out and to turn the character of the future business to legitimate business, I advised Dunfee and Terwilliger that the Co. should purchase the property so that the stockholders would not suffer a loss of the value of their stock by a termination of the lease, and not to try to sell to persons of small means, but seek to enlist capital on a large scale, as such people would be much better able to take a chance on a mining deal, and if a loss occurred be able to stand it. For the purpose of encouraging the purchase [250] of the property so that the stock should have the solid basis of ownership, and also to avoid the dealing with persons of small means, I, as attorney in fact of Le Champ d'Or, offered to sell the property on an option to purchase the same by the Orleans M. & M. Co. for $35,000.00 and strongly advised, supported by Dunfee, that sufficient stock be sold to one person if possible to consummate the purchase, for the reasons given. The result was that an agreement was made between Terwilliger and Dun-

fee bearing date the 25th day of September, 1917, in which the sale of *200,00* shares was agreed upon and the proceeds used to purchase the property, a copy of which is hereto attached and marked Exhibit "B." Terwilliger had a scheme in mind, and urged the adoption of it, of securing a permit under the Blue Sky Laws of California, by petition, to sell stock in that state, which he proposed to do by travelling over the state and selling in whatever amounts he could find purchasers for, which would mean that he was to deal with persons of small means, with the consequences already specified of an expiring lease, and the dissatisfactions which follow the small investor. The letter inclosed (copy) relates to the blue sky proposition. The letter is dated before the agreement marked Exhibit "B," and Terwilliger's discussions of this blue-sky proposition had been for some time before the date of the letter, and is marked Exhibit "C."

Before going further into the dealing on said agreement Exhibit "B," and the blue-sky proposition, I wish to give the full facts regarding the private secret agreement made on the 15th day of February, 1917. This agreement, for the convenience of Terwilliger, was made in two parts, 1st, the part that related to the stockholders who paid in the $8000.00, and second the part that related to the $12,000.00 and $5000.00 respective that Dunfee and Terwilliger should receive, this for the purpose of Terwilliger's showing the same to the stockholders who paid the $8000.00 and making them

believe that they were the preferred ones, without letting them know that he and Dunfee were to be profiteers as well, in order to make boosters out of them, and enable Terwilliger to sell them four times as much stock as they had already bought, and as well use them as boosters to sell large amounts of stock to their neighbors. Terwilliger in urging this agreement, gave as his reasons for its execution and adoption, the foregoing: to-wit: "That he could sell the said stockholders four times as much stock, and as well large amount to others in that vicinity," so Dunfee informed me. I enclosed a copy of this private agreement bearing date February 15th, 1917, and call particular attention to these facts connected with it, to-wit: That it was never suggested in a directors'meeting nor does it appear on any minute or record of the company whatever; that it was made between the promoters a long time nearly six months after the incorporation of the company; that it was made after all the $8000.00 had been paid in for the 32,000 shares of stock and could not have been used as an inducement for the stockholders to purchase the $8000.00 worth of stock from Terwilliger as the date of it, February 15th, 1917, precludes that possibility; that this agreement as to said stockholders receiving all of their investment back out of the first profits of the Company must have applied to the future sales of stock made by Terwilliger subsequent to its date, and lastly that Terwilliger has attempted to deceive these stockholders, and we believe Mr. Atkinson his former Attorney, by setting

up so called valid claims of these stockholders for the return of their money, upon a guarantee that never existed until after the money had been paid. This scheme was acted upon by the actual return to these stockholders as a dividend, of $800.00 of the $5000.00 paid in for development purposes under the contract of September 2nd, [251] 1916, which is evidenced by the following checks pro-rated among the stockholders aforesaid who paid the $8000.00 in the following amounts:

Feby. 28, 1917.	Leslie Smith, 1000 shares.	$ 25.00
Feby. 24, 1917.	Mrs. Jennie Robinson, 2000 shares	50.00
Feby. 26, 1917.	Geo. J. Shank, 4000 shares	100.00
Feby. 24, 1917.	Albert Lackman, 6000 shares	150.00
Feby. 27, 1917.	T. B. Shank, 4000 shares ..	100.00
Feby. 24, 1917.	J. T. Taecker, 6000 shares	150.00
Feby. 24, 1917.	H. P. Fites, 2000 shares ..	50.00
Feby. 26, 1917.	Geo. R. Droffmeyer, 6000 shares	150.00
Mar. 9, 1917.	C. A. Terwilliger, 1000 shares ..... (evidently being for Mel-) (ville W. Curn's 1000) (shrs. Terwilliger sub-) (scribed for No. stock-) (holder)	25.00
	Total	$800.00

You can well imagine the way I felt when I found that this secret arrangement existed; which

after the incorporation for nearly six months, was used to pledge the profits of the company, to the repayment of the capital, paid in for the development of the property to give preferences as described, and how these parties when they got these *pro rata* amounts repaid them, under the belief that the mine was producing such returns, were falsely led by Terwilliger to believe they were to receive the return of their whole money, thus putting these stockholders in meretricious relations to the company, through the profiteering spirit of Terwilliger, whose business it was to raise the money to finance the Company, the business of Dunfee being to do the development work, and to direct the mining operations. Dunfee explained to me, that it being Terwilliger's business to raise the money by a sale of stock to finance the company, while he had misgivings of unfairness on the part of Terwilliger in getting up this scheme, yet as his business was to attend to the mining part, he did not feel like absolutely opposing Terwilliger although his judgment was against the scheme, and he told me about it to advise with me, with the results already stated. Reference is here made to a letter of Terwilliger dated Sept. 30, 1918, marked Exhibit "——," in which Terwilliger talks about the "legality of Mr. Curn's insisting on the return of his investment," as to the situation which Terwilliger caused to exist, directly springing from this scheme, and in which we believe Terwilliger was using the $25.00 check above mentioned for his own benefit, instead of for Curn, he being the only

subscriber not prorated to under said distribution, and that fact may account for Curn's demand as per Terwilliger's statement for a return of his money, to wit: He did not get what the others got, his *pro rata.*

Whatever Terwilliger said to these stockholders in the way of making promises to them of returning their money, surely, neither such promises, or the agreement of February 15, 1917, can bind the Orleans M. & M. Co., for they were never the act of the company, not authorized by it at any time or in any manner whatever; for, as the Company was organized in September, 1916, and from that time on had a board of directors, any agreement to bind the company must have been made or ratified by the board of directors, and as this one never was, the agreement made by two of its promoters after the incorporation cannot bind it in the least. As shown the majority of its directors who knew of it, to wit: Dunfee and myself, repudiated it. Such a contract was illegal on other grounds, as it was an unfair advantage over other stockholders, and could have [252] been set aside, if the question ever came up before the board of directors to make distribution of the profits of the Company under it. An act done when the company has a board of directors must receive its binding effect through their action alone. Our efforts to get Terwilliger to cancel this agreement of February 15, 1917, resulted in the letter of August 30th, 1917, in which he says: "I hereby cancel the agreement by which I was to receive $5,000.00 from the

Orleans Mining and Milling Company, and said agreement is to be canceled and returned to the Secretary of said Company upon my return to Brawley; I hereby declare no indebtedness exists against said Company to me." A copy of this letter is marked Exhibit "D." This contract as to Terwilliger and Dunfee was sent in by Terwilliger and canceled by me as well as the copy of it and also that regarding the stockholders as well held by Dunfee. But Terwilliger has held the one which he had applying to the stockholders, and has in his letter of Sept. 30, 1918, set up the pretended legality of Curn for a repayment of his investment. See that letter a copy of which is inclosed. I believe Curn was not distributed to, and that was the cause of his demand. No other stockholder but Curn ever complained. If any promises were made them for a return of their investment, surely Terwilliger made them, and it is to him they should look for such return, if to any one. The separate part of the said agreement referring to the stockholders, Terwilliger never returned although we made an effort to get it returned and canceled as well, but Terwilliger clung to it tenaciously, and we got it from Mr. Atkinson, that he was personating for these stockholders, making demands on the Company for such return, when, as we have shown, he was the man responsible for the false position they were placed in. We have gone into these matters somewhat in detail, in order that you may see, whose acts and conduct was in the line of deception, Dunfee and I, or Terwilliger, and

who did right, we or he in trying to get in this contract, which was unauthorized by the Company and unfair to the stockholders, and every one having, or to have an interest in the Company.

We will now return to the Agreement of Sept. 25, 1917, and the blue-sky proposition already mentioned. As stated the agreement of Sept. 25th, 1917, was intended to direct Terwilliger's efforts to selling stock to persons of means and to avoid the petty business of peddling stock to cooks, barbers, chambermaids and hashers, who need their earnings for present needs and cannot stand a loss. During all the fall of 1917 Terwilliger traveled around through California and Nevada to sell stock under this agreement, but utterly failed to sell any, expending in the effort $500.00 for traveling expenses. In the early part of January, 1918, Dunfee requested me to write to Terwilliger and secure a report from him as to what he was going to do further, and a copy of my letter marked Exhibit "E" is hereto attached. In reply, I received a letter marked Exhibit "F" and hereto attached dated January 16th, 1918, with contract of September 25th, 1917, enclosed marked by Terwilliger "canceled." From the cancellation of this contract down until the mine was shut down on October, 1918 (Oct. 10), Terwilliger did not sell a share of stock, or raise a dollar in any other way to help run the mine. He came to Hornsilver in the Spring of 1918 and stayed there 2 or 3 weeks doing nothing but look wise, for his talent never run in the practical of directing mining operations.

Dunfee had encountered a fault and had to sink and then drift to get around it, and the ore found in 1918 was low grade and very little profit in it, and was shipped to Brady's Mill at Hornsilver, and we had trouble to get Brady to settle for the ore, his company having gone into a receivership. Terwilliger went with me to Reno on a trip that I made to see Brady, and spent [253] $100.00 on the trip in expenses. Terwilliger was in Goldfield on the first of August, 1918, and all of us had a talk over the matter of failure to sell stock and the straightened situation in the finances of the Company were in, and we determined to make a report of the Company's policy, and a copy of the same is hereto attached, and marked Exhibit "G," in which the following language will be found: "The owning Company has given its consent in writing directing Mr. E. Carter Edwards, to extend the lease for another year, that is to June 1st, 1920, which will be done." The words: "Which will be done" refer to something to be done in the future during the continuance of the lease, to-wit: The writing of the extension on the back of it, as had already been in the two extensions granted, which was the manner selected of evidencing extensions which the lease shows. No demand was ever made during the life of the lease, or after it expired, or at any time whatever at all, for this extension, parol or in writing or otherwise. But taking this language in its most favorable meaning, that is that an extension was then and there granted of the lease to June 1st, 1920, without fur-

ther act in writing or otherwise, Terwilliger from the 1st day of August, the date of said agreement extending down to the latter part of July, 1921, when the Orleans Hornsilver Mining Co. bought the lease and option of Dunfee and the rights of Le Champ d'Or, or the whole property, never raised a dollar by sale of stock or otherwise, never entered upon the ground, never agreed with Dunfee in any proposition to raise money to develop the property, but left Nevada and stayed away, never wrote to Dunfee or myself on that subject except to Dunfee as hereinafter specified and then failed to propose a proposition, and the extension of the lease to June 1st, 1920, expired, and 14 months after that expired, when Dunfee and myself sold out the whole interest as stated, and only until then do we hear of the Terwilliger demand for one-half of the Dunfee Interest, which was made out of the mine by development done after the extension to June 1st, 1920, had fully expired as shown.

To show Terwilliger's failure to do any act looking to the further development of the mine, or to obtain a further extension of the lease after the expiration of the extension of August 1st, 1918, to June 1st, 1920, or for any other further time whatever, we continue the narrative.

The agreement of September 25th, 1917, canceled and sent in by Terwilliger, and the blue-sky proposition abandoned, and Terwilliger having made no effort after January 16th, 1918, to raise any money, and his letter to Dunfee under date of Sep-

tember 30th, 1918, peremptorily demanding the closing down of the mine, are the facts we proceed from in the continued narration. Dunfee being ordered to do so by a man who backed his demand by a 50% ownership of the stock (the stockholders in Imperial Valley Included) immediately closed down the mine and paid off the remaining debts, which amount to $404.00. The report and recommendations under date of November 6th, 1918, mention this statement, which no doubt you have if you received the papers held by Mr. Atkinson. Mr. Dunfee says that this statement shows an unpaid balance due by the company of $202.00, and an equal amount of unpaid debts were presented some time afterwards that made the $404.00. Dunfee paid off this balance and never troubled Terwilliger with it, out of his own money. The report and recommendations we attach and mark Exhibit "H." We call attention to this report for its frank and fair character and its praising the mine, and shows on its face that no fact is being concealed that could be said in its favor. We also refer to the statement made August 1st, 1918, as to the [254] policy of the company, in which the mine is in nowise disparaged, and that all the other reports and mention of the property found in the Exhibits attached place the mine in an optimistic and deserving light, and as a proposition of merit. But this report did not please Terwilliger, and he wrote Dunfee a letter which we do not have in hand, criticising, and intimating that he stood between the stockholders and impending

danger, who if he failed to restrain, would result bad for Dunfee and the Company. Dunfee's reply to this, a copy of which is attached and marked Exhibit "I," tells Terwilliger how ready and willing he is for the stockholders to know all about anything they desired information on.

In order for a fraud to be perpetrated in a case of this kind, there must be some essential fact withheld, or misstatement, or something done to deceive. The letter ordering the shutting down of the mine shows on its face that Terwilliger thought he had a fair run for his money, and the reports and exhibits show his full knowledge of the situation. It remained for him to act upon this knowledge. Did he? He did nothing from now on until the lease expired on June 1st, 1919, and then did nothing during the running of the year dating from the expiration of the lease by extension June 1st, 1919, for the whole year for which the last extension was granted, to wit: From June 1st, 1919, to June 1st, 1920, when the last extension expired, and all the rights of the Orleans M. & M. Co. ended over the mining property in question. I, as attorney in fact, after that termination, had the undoubted right to grant a lease to anyone else, although if Terwilliger and Dunfee had made a *bona fide* offer to secure another lease would have found me favorable to entertain any reasonable proposition that they might have presented, as I was looking for just that thing, as Dunfee afterwards proposed to Terwilliger just before the ex-

piration of the last extension in May, 1920, as we will soon show.

After the letter of Dunfee dated January 31st, 1919, Exhibit "I," nothing more was heard from Terwilliger until February, 1920, being about 13 months, when either he or Dunfee wrote first, and Dunfee replied by letter written about March 2d, 1920, in which he stated to Terwilliger "That Orleans was best mine in the State of Nevada, which conclusion he had come to after traveling over the state, and that if he, Terwilliger, would come up and they talked the matter over with me, *the* he thought I would grant them a lease." This letter of Dunfee's Terwilliger replied to on May 2d, 1920, and we attach a copy and mark it Exhibit "J," is as follows:

"4419 Finley Ave., Los Angeles, Cal.,
May 2, 1920.

J. W. Dunfee,
Goldfield, Nevada.

Friend Will:

Your letter of some time ago received, and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding the matter of the Orleans property? I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved.

Yours very truly,
C. A. TERWILLIGER."

Dunfee did not go down nor did Terwilliger come up. This letter as its date shows, was written less than a month before the expiration of the last extension, on May 31st, 1920, I have not the letter of Dunfee dated March 2d or about that time, but possibly you have in the papers. After this letter the last extension expired. In June, 1920 and after the expiration of the last extension [255] Dunfee for the first time after the closing down of the mine in October, 1918, under Terwilliger's orders, started to mining on the property under a lease and option that I gave him, and worked on the mine about three months in the summer of 1920. In this lease and option, I had reduced the original royalty of 26¼% to 20%, as Dunfee very justly complained that the old royalty was too high especially considering the high cost of labor and mining supplies, and the increased depth of the mine. In doing this development during the summer of 1920, Dunfee broke himself, and during all the fall of 1920 the mine was idle and no work done therein. In December, 1920, Dunfee talked the matter over with me, and suggested the bad luck he was in, and proposed that I cancel the lease and option given him on which he failed in the summer of 1920, and that I give him a new one for a long time, and reduce the royalty to 15%, which I did, cancelling other lease and option and granting the new one at 15%, and the doing of this—a long time (4 years) being given, is, I believe, the act of mine that made the discovery of the ore possible which has resulted in the

Orleans proving a mine,—was the granting this new lease and option, for without it Dunfee would have been discouraged, and in all probability not taken any more interest in it, considering the bad luck he had had. After granting this new lease, Dunfee went to work in January, 1921, and discovered the ore in about the middle of March, 1921;—And the development of the same until the 7th of July following, has made this mine, and made the sale of the property a fact. In doing this development work from January to March 15, 1921, Dunfee borrowed from his friends, and extended his credit to the breaking point, and when he did strike the ore in a drift 230 feet from the shaft on the 700-foot level, he would have given over the lease in a few days more, and thrown up the whole matter, he says he was in a couple of days of his limit. Furthermore, he worked alone and climbed down a 600-foot shaft, and threw his muck back into drifts, and gophered around in the workings looking for the ore. He found it, and surely his right to it cannot be questioned. From June 1st, 1920, to March 15, 1921, is ten and a half months, after the extension last given had expired, and the last heard of Terwilliger was May 2d, 1920, until he set up his claim in the latter part of July, 1921, about 14 months. Terwilliger has not put up a dollar nor offered to put up one since the cancellation of the contract in January 1918, to the sale of the property in July, 1921.

He sold $100.00 worth of treasury stock, the only treasury stock ever sold, and did not turn the

money in, to a man by the name of Winkler at Hornsilver. He never put up a cent of his own money, but it was all from the stock he sold his neighbors to get the $8,000.00. We also send copy of report showing business for the year 1917, in which it appears that Terwilliger got $1,200.00 Ex. "K." $800.00 of this was prorated among the stockholders; $400.00 given as expense money, and subsequently $520.00 given him for expense money, and the $100.00 to Reno, making with his share of $404.00, $202.00, $2,022.00 that he received, which left of the $5,000.00 received for development purposes less that $3,000.00. Also Dunfee advanced at times, in order to keep the mine running when Brady was delaying payments for the ore, out of his own moneys, as much as $2,000.00. These facts when compared with Terwilliger's acts, all bear on the question, was he defrauded. We say no. If there was any fraud, it was his in the manner of dealing with the stockholders already described, and paying dividends out of the money paid in for development purposes. I am sincerely glad that the end found the mine clear of any cloud that might have resulted from getting in a lot of small stockholders, and they found out after the end of the [256] lease, for the first time, that their holdings were based upon a lease and now ownership of the mine. It looks like this property now bids fair to make a mine, and the Company that bought Dunfee and the Le Champ d'Or out are men of merit who have spent their money, and now spending at the rate of $5,000.00 more per month, and

such a fair prospect is attracting mining men and money to this district, and it looks almost criminal for a peddler like Terwilliger to start any litigation, based upon no meritorious grounds, and hold up and impede a worthy mining enterprise, and block better business which we all so ardently look for. They are now raising the money with sufficient ore in sight to justify it, to erect a mill, with water and electric power, which will cost with sufficient capital to run it in its initial stages $300,-00. Hornsilver has become one of the most promising camps in Nevada, and we should give it a fair chance to grow, and avoid useless litigation in its early life, whatever it may be able to stand in its later stages. The Orleans M. & M. Co., after its operation of the lease and its expiration, I am informed, has been subject to dissolution, because it did not pay its annual stipend to the resident agent and to the State of Arizona, for the years 1918, 1919, 1920 and 1921, and whether the Attorney General of Arizona has actually brought proceedings for such purpose, or the same have been ended, and the Company dissolved, I am unable to say, but know notices were received to the effect that such could be done.

From the foregoing, the following facts appear:

1. That Terwilliger did not put up a cent of his own money.

2. That his manner of selling stock, and using the proceeds of sales for the purpose of paying dividends, was unfair and fraudulent.

3. That he was in the possession of the full facts at all times, and there was no misstatement or concealment made to him.

4. That he had a fair run for his money.

5. That he ordered the mine closed down, and never at any time ordered it re-opened, or raised, or helped raise any funds to re-open.

6. That the only money he raised was the $8,000.00, and the $100.00 from the sale of treasury stock, that he failed to turn in.

7. That the extension to June 1st, 1920, fully expired, and though notified a month before such expiration by Dunfee in his letter of March 2d, 1920, he took no steps to secure a further extension, or to raise any further funds with which to develop the mine.

8. That ten and a half months had expired after the expiration of the extension to June 1st, 1920, before Dunfee struck ore.

9. That Dunfee put up his own money and credit, from June, 1920, to July, 1921, in discovering the ore and developing it, without any assistance whatever from Terwilliger.

10. That Dunfee at all times boosted the mine, and always encouraged Terwilliger by his reports and statements as to the future possibilities of it, upon proper development.

We believe the foregoing facts contained in this history, and the accompanying exhibits, will enable you to judge whether or not we have defrauded Terwilliger, or prevented him from exercising his full rights as a stockholder and director

of the Orleans M. & M. Co. We have given you the same consideration in this respect that we gave Mr. Atkinson. We will add the belief, that Terwilliger will treat you like he has all that he has dealt with: Put up no money himself, but leave you and others to bear the burden of any suit that you might bring.

In conclusion, will say that I have given these facts in [257] confidence for your private consideration, in the belief that you will exercise your good judgment in their consideration, and will be free to exercise your unbiased judgment as to whether or not a suit should be brought, and if you should agree with us, we would be pleased for you to favor us with your final determination in the matter.

Yours very truly,
E. CARTER EDWARDS,
Atty. for J. W. Dunfee. [258]

Mr. COOKE.—In reference to Plaintiff's Exhibit 18, being the letter of March 16, 1922, I call your attention to this statement appearing on page 8: "In doing this development during the summer of 1920, Dunfee broke himself, and during all the fall of 1920 the mine was idle and no work done therein. In December, 1920, Dunfee talked the matter over with me, and suggested the bad luck he was in, and proposed that I cancel the lease and option given him on which he failed in the summer of 1920, and that I give him a new one for a long time, and reduce the royalty to 15%, which I did, cancelling

(Testimony of E. Carter Edwards.)

other lease and option and granting the new one at 15%." Is the lease that you referred to there the lease of June 5th, 1920?

(A.) Being cancelled; yes, sir.

(Q.) And were you not mistaken in your testimony a moment ago when you said that lease was surrendered and cancelled in October?

(A.) I didn't say it was cancelled in October, but turned in for cancellation.

(Q.) That is how you intended to put that?

(A.) Yes.

(Q.) It was in fact turned in, but not cancelled?

(A.) Yes.

(Q.) And was in full force until December, is that right? (A.) It was.

The WITNESS.—(Continuing.) All that Mr. Dunfee did in October was to turn in and hand me the lease of June 5, 1920. At the same time he said he was unable to do the monthly shifts, or to perform the conditions of the lease.

(Q.) Did he say anything as to why he wanted you to have possession of the paper instead of himself? (A.) Yes, for cancellation.

(Q.) Then he told you in October that he wanted the [259] lease cancelled? (A.) Yes.

(Q.) What did you say to him?

(A.) I just took the paper and held it.

(Q.) What was it you did in December in the way of cancellation?

(A.) It was this: Mr. Dunfee handed this in for cancellation, I waited to see if he might change his

(Testimony of E. Carter Edwards.)

mind; I wanted the ground protected, and Mr. Dunfee was the only man I had at that and I didn't want to give him up; I wanted to have another chance to protect my property.

(Q.) Then you refused to cancel the lease in October, when he turned it in, in the hope that maybe he would change his mind?

(A.) Well, I didn't refuse it, but I just held it subject to his orders in that respect.

The WITNESS.—(Continuing.) I think there is a written endorsement of cancellation on that June 5th, 1920, lease. It was written on there on the date that it bears. The date is January 1, 1921. The position is that while he turned this lease in, I didn't act upon it in the way of cancelling it until the date of cancellation as shown by the endorsement upon it. Dunfee reiterated in December his proposal that I cancel the lease.

Redirect Examination by Mr. TILDEN.

That long letter introduced by Mr. Cooke was written at Mr. Cooke's request.

TESTIMONY OF R. H. DOWNER, FOR DEFENDANT (RECALLED.)

R. H. DOWNER, recalled by defendant, testified as follows:

The blue-print of the map of the underground workings of the Orleans properties turned over to me by the Tonopah Mining Company has upon its face the assay results. After that blue-print [260]

(Testimony of R. H. Downer.)

was turned over to me I checked up the assays on the ground to a sufficient extent that convinced me that the results are correct. That covered a portion of the mine that extends to the 600 level and thence southeasterly to the vertical line called the Downer line on the map. My checking of assays on that portion of the mine was with the result with respect to the enrichment of the ground, that there are no ore bodies or deposits of any consequence left in the mine above that point, the line designated as the Downer line.

TESTIMONY OF MRS. M. C. KELLY, FOR DEFENDANT.

Mrs. M. C. KELLY, called as a witness for the defendant, duly sworn, testified as follows:

Direct Examination by Mr. TILDEN.

I live in Hornsilver; have lived there since May, 1907. I have been postmaster there since 1911. I have known Mr. Dunfee since 1913.

(Q.) Were you in Hornsilver—I don't suppose it is disputed that Mr. Dunfee was not on the ground from the date that the lease closed down until after the lease expired, May 31, 1920—

Mr. COOKE.—I don't think it is disputed, but I am not clear.

The WITNESS.—(Continuing.) I was in Hornsilver during all of the time between October 10, 1918, and May 31st, 1920. Mr. Dunfee was not operating there during that time. I was there from

(Testimony of Mrs. M. C. Kelly.)

January 1, 1921, on continuously. After that date Mr. Dunfee was operating the Orleans mine. He came out there right after New Year's in January, 1921, and started to work. He worked alone there from January 2, until about the middle of March, entirely alone.

Cross-examination by Mr. COOKE.

The mine is about seven hundred or eight hundred feet from the postoffice. I was there continuously during the period from January 2d, 1921, to March, 1921. I don't think that I was out of town one day or one night. [261]

TESTIMONY OF MRS. M. E. DUNFEE, FOR DEFENDANT.

Mrs. M. E. DUNFEE, called for defendant, duly sworn, testified as follows:

I was Mr. Dunfee's wife up to about 1912. Am no relation to him now and haven't been since that time. But our relations are friendly and we have communicated with one another quite frequently and he has visited me. I know Mr. Terwilliger; have known him since 1907. I saw him in Los Angeles in 1919, met him on the street about Eighth and Broadway and talked with him. He said that he had Mr. Dunfee tied up in a contract whereby if he sold the mine or the lease he would put him in the pen. I don't know whether I told Mr. Dunfee exactly those words or not; but Mr. Terwilliger also said that if Mr. Dunfee came into California

(Testimony of Mrs. M. E. Dunfee.)

he would attach his automobile and I told Mr. Dunfee that in a letter. I told Mr. Dunfee that Mr. Terwilliger was very angry with him. I saw Mr. Terwilliger in 1920, August, I believe it was, in Los Angeles at about Fourth and Broadway Street. We shook hands and he asked me if I had heard from Mr. Dunfee, and I told him no, and he said that he heard that Mr. Dunfee was about to sell the mine, or the lease. I don't know which, to a Mr. McMahon, and he said if he did that he would land him in the pen. I know that Mr. Terwilliger knew that Mr. Dunfee and I were in frequent communication because he and Mrs. Terwilliger and I used to talk; they have been to my place and we have been to their hotel. They always knew that we corresponded. The date of that first conversation with Mr. Terwilliger was about April or the 1st of May, 1919. The conversation at Fourth and Broadway was a short time before Mr. Dunfee came down in September, 1920.

Cross-examination by Mr. COOKE.

I think Mr. and Mrs. Terwilliger were living at their residence in Hollywood in September, 1920, the same place they had lived since they came up from Brawley. I saw Mr. Dunfee when he came down in September, 1920. He stopped at our house. At that [262] time we lived at 430A South Eastlake Avenue. In 1918 I lived in Bell, California, a little town east of Los Angeles. When I said Mr. Dunfee stopped at "our" house I meant my mother's

(Testimony of C. A. Terwilliger.)
house. That house on South Eastlake Avenue is about ten miles from where the Terwilliger's lived at that time.

TESTIMONY OF C. A. TERWILLIGER, FOR PLAINTIFF (IN REBUTTAL).

C. A. TERWILLIGER, called in rebuttal, testified as follows:

I did not receive a letter from Mr. Dunfee dated March 2, 1920. I received no letter from Mr. Dunfee written in the month of March, 1920, except the letter of the 26th of that month. I was then living at Los Angeles, 4419 Finley Avenue. I was living there in the month of August and September, 1920, the same place. During that period I called Mrs. Dunfee up by telephone several times and I think I got in communication with her two or three times. I was calling her to ask her about Mr. Dunfee, if she heard from him, if he had been down or if he was down. She said she hadn't heard from him for some time and didn't know when he would be down, and I think she was living at that time, I can't positively say where she was living, but I spoke about coming over, and I asked her if she was going to be home, and she said no, she was busy, and that she would be out; so I called a couple of times, and it didn't seem convenient for her to have me over there, that is, she was busy at that time, all the time, so each time that

(Testimony of C. A Terwilliger.)

I called I didn't get to see her; there was something, I failed to see her.

Cross-examination by Mr. TILDEN.

Her mother answered the phone once, but that is all that I ever had a conversation with her mother. Mrs. Dunfee told me she was nursing.

Mr. TILDEN.—I will ask permission of the Court to add at the end of paragraph 8 of the answer, by interlineation, the [263] words, "denies that the January 1, 1921, lease was a modification, extension or renewal."

Mr. COOKE.—That is made to meet our amendment?

Mr. TILDEN.—Yes.

The COURT.—It will be permitted.

BE IT FURTHER REMEMBERED: That on the 6th day of December, 1922, the cause was argued by respective counsel, plaintiff's counsel moving the Court for a finding and judgment in plaintiff's favor on the ground that the evidence shows that in equity he is entitled to such relief, and defendant's counsel moving the Court for the dismissal of the cause on the ground that plaintiff by his pleading had elected to pursue and try to recover the lease dated January 1, 1921, Defendant's Exhibit "J," obtained by Mr. Dunfee, and is not now entitled to pursue or seek to recover the proceeds of the sale of said lease, and further moved the Court, if such dismissal is not granted, for findings and judgment in favor of defendant

Dunfee on the ground that the facts do not show that plaintiff is in equity entitled to any relief. The Court thereupon took the cause under advisement, and thereafter on the 7th day of October, 1925, in the absence of parties and counsel, filed a written opinion and decision denying defendant Dunfee's said motion and deciding said cause in favor of plaintiff and against defendant Dunfee; and thereafter on the 16th day of November, 1925, in the absence of parties and counsel, filed its findings and judgment and decree in pursuance of said decision. That none of the objections or motions made on behalf of defendant Dunfee during the trial, rulings on which were reserved by the Court, were ruled upon by the Court except as herein appears. That said findings are as follows: [264]

(Title of Court and Cause. Appearances.)

FARRINGTON, District Judge.

FINDINGS OF FACT.

This cause came regularly on to be heard on December 1, 1922, upon the Complaint of plaintiffs and the answer of the defendant J. W. Dunfee—the suit as to the defendant Orleans Hornsilver Mining Company, a corporation, having been dismissed by plaintiff; Messrs. Cooke, French and Stoddard appearing as counsel for plaintiffs and A. Tilden, Esq., appearing for the defendant Dunfee. Witnesses were sworn and examined on behalf of the respective parties and oral and documentary

evidence adduced, and thereafter the cause was argued and submitted to the Court, and thereupon the Court makes Findings of Fact as follows:

I.

That the allegations of Paragraphs I, II, III, IV, V, VI, VII, and VIII of plaintiffs' complaint are true.

II.

That the cash consideration agreed to be paid by said Orleans Hornsilver Mining Company to the said defendant Dunfee for the assignment mentioned in Paragraph IX of said complaint, was Forty Thousand Dollars and not Fifty Thousand Dollars as therein alleged; that prior to said assignment the said Orleans Hornsilver Mining Company had no knowledge or notice of the acts charged against the defendant Dunfee by the plaintiffs and that, save as above modified, the allegations of Paragraph IX of plaintiff's complaint are true.

III.

That the shutting down of the mine as alleged in Paragraph II, and elsewhere in the answer of defendant Dunfee, was not intended as an abandonment but only a temporary discontinuance of [265] operations until mining conditions should improve; that the mine was self-sustaining and free from debt, and no other money than that raised by the plaintiff Terwilliger, in addition to the earnings of the mine itself, was necessary to pay expenses; that while Dunfee was acting as president, treasurer and general manager of the Orleans Mining and

Milling Company, he discovered a fine showing of ore in part running from forty-five to fifty dollars per ton, and he also learned where more ore could be probably found, and in so doing he expended above the earnings of the mine about five thousand dollars, which money had been procured from persons *wo* whom the plaintiff Terwilliger had sold stock of the company, and that the defendant Dunfee himself had received three thousand dollars, from the same source; that said Dunfee was occupying a confidential and fiduciary relation to the Orleans Mining and Milling Company and its stockholders; that the said Terwilliger and the other stockholders hoped and expected that a renewal of the lease would be obtained for the Orleans Mining and Milling Company; that they were amply justified in believing and relying on the assurance of the defendant Dunfee that he could and would procure such further extension, and that this hope and expectancy was a valuable property right; that the lease acquired by the defendant Dunfee in his own name about January 1, 1921, and transferred by him to the Orleans Hornsilver Mining Company on July 18, 1921, was acquired during and while he was acting for the Orleans Mining and Milling Company as president, treasurer and general manager.

CONCLUSIONS OF LAW.

I.

That the defendant Dunfee should be decreed to have, receive and to hold the one hundred and

fifty thousand shares of the capital stock of the Orleans Hornsilver Mining Company and the forty thousand dollars in money, in trust for the plaintiffs, [266] and that such be the decree of this Court herein, and within the time to be therein specified the said Dunfee should be adjudged and decreed to fully account for and pay over to plaintiffs the said one hundred and fifty thousand shares of stock, and said sum of forty thousand dollars.

Done in open court this 16th day of November, 1925.

FARRINGTON,
District Judge.

And now, within the time required by the Equity Rules, defendant Dunfee presents and lodges with the Clerk, for examination by plaintiff and the approval of the Court or Judge, this his condensed statement of the evidence and proceedings had at the trial essential to the decision of the questions to be presented for review on his appeal in the above-entitled action, and prays that the same be settled, alowed and approved.

Dated, February 20th, 1926.

AUGUSTUS TILDEN,
Attorney for Defendant Dunfee.

ORDER SETTLING AND APPROVING STATEMENT OF FACTS.

The foregoing statement, including attached map, contains in proper form all of the evidence and proceedings essential to the decision of the questions for review on defendant Dunfee's appeal in

the above-entitled cause, and the same is hereby settled, allowed and approved.

Dated, this 7th day of May, 1926.

E. S. FARRINGTON,
United States District Judge.

[Endorsed]: Filed May 7, 1926. [267]

[Title of Court and Cause.]

STIPULATION RE DEFENDANT'S EXHIBIT "K."

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for plaintiffs and the attorneys for defendant, J. W. Dunfee, that in the preparation and certification of the statement of the record on appeal by the Clerk of said court that the map of the stope assay plan of the Orleans Mine admitted in evidence and marked Defendant's Exhibit "K" may be detached from the original statement of facts and attached to the copy of the statement of facts to be certified to the Circuit Court of Appeals by said Clerk.

Dated this 4th day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiffs.
AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Defendant J. W. Dunfee.

[Endorsed]: Filed this 5th day of June, 1926, 9 A. M. [268]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Nevada,—ss.

I, E. O. Patterson, Clerk of the District Court of the United States for the District of Nevada, do hereby certify that I am custodian of the records, papers and files of the said United States District Court for the District of Nevada, including the records, papers and files in the case of C. A. Terwilliger, etc., Plaintiffs, vs. J. W. Dunfee et al., Defendants, said case being No. B–39 on the docket of said court.

I further certify that the attached transcript, consisting of 272 typewritten pages, numbered from 1 to 272, inclusive, contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such Clerk [269] in the City of Carson, State and District aforesaid.

I further certify that the cost for preparing and certifying to said record, amounting to $137.45 has been paid to me by the defendant J. W. Dunfee in the above-entitled cause.

And I further certify that the original stipulation waiving citation issued in this cause is hereto attached; and accompanying this record, in accordance with a stipulation filed in this cause, is the original Defendant's Exhibit "K," which is to be returned to the above-entitled office upon the completion of this cause.

WITNESS my hand and the seal of said United States District Court this 17th day of June, A. D. 1926.

[Seal] E. O. PATTERSON,
Clerk U. S. District Court, District of Nevada.
[270]

[Title of Court and Cause.]

STIPULATION WAIVING CITATION ON APPEAL.

IT IS HEREBY STIPULATED AND AGREED, that in that certain case in equity as above entitled and wherein the petition for appeal has been allowed to the defendant, J. W. Dunfee, herein to the Circuit Court of Appeals of the United States for the Ninth Circuit, that the citation and admonishment to be and appear in said court at San Francisco, State of California, be, and the same hereby is, waived, and

IT IS FURTHER STIPULATED AND AGREED, that the above-named plaintiffs C. A. Terwilliger et al., may have and they are hereby given, up to and including the 31 day of July, 1925, from date hereof, or such further time as may be

allowed by stipulation or by order of the Court, to show cause, if any there be, why the judgment and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Dated: at Reno, Nevada, this 1st day of June, 1926.

COOKE & STODDARD,
Attorneys for Plaintiff.
AUGUSTUS TILDEN,
JNO. F. KUNZ,
Attorneys for Defendant, J. W. Dunfee. [271]

[Endorsed]: Filed this 2d day of June, 1926, at 9 A. M. [272]

[Endorsed]: No. 4887. United States Circuit Court of Appeals for the Ninth Circuit. J. W. Dunfee, Appellant, vs. C. A. Terwilliger, on Behalf of Himself and All Other Stockholders of the Orleans Mining and Milling Company, a Corporation, Similarly Situated, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the District of Nevada.

Filed June 19, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 4887.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

J. W. Dunfee,

Appellant,

vs.

C. A. Terwilliger, on Behalf of Himself and All Other Stockholders of the Orleans Mining and Milling Company, a Corporation, Similarly Situated,

Appellee.

APPELLANT'S BRIEF.

AUGUSTUS TILDEN,
JOHN F. KUNZ,
Attorneys for Appellant.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

No. 4887.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

J. W. Dunfee,

Appellant,

vs.

C. A. Terwilliger, on Behalf of Himself and All Other Stockholders of the Orleans Mining and Milling Company, a Corporation, Similarly Situated,

Appellee.

APPELLANT'S BRIEF.

STATEMENT OF THE CASE.

This is an action by Terwilliger, as a stockholder of the Orleans Mining & Milling Co., to follow into Dunfee's hands and impress with a constructive trust money and stock realized by Dunfee from the sale of a mining lease on the Orleans Mine taken in his own name, but which, Terwilliger claims, Dunfee should have taken in the name of the Orleans Company.

At the outset Dunfee owned, admittedly in his own right, a lease on the Orleans Mine. He took Terwilliger in with him, and together they organized the Orleans Company to finance and operate the lease. Their agreement was put into writing providing in substance that in consideration of Dunfee's assigning the lease to a corporation to be formed, and of the equal division between Dunfee and Terwilliger of the promotion stock of such corporation, Terwilliger would raise $8000 by the sale of some of his shares, of which $3000 should go to Dunfee and $5000 into the treasury of the corporation. All of these things were immediately done, so that the contract became immediately wholly executed except as to one clause, which reads:

"It is further agreed that should it be deemed advisable after the full $8000 is raised to raise more money for development, the stock so sold shall be taken share for share from the holdings of J. W. Dunfee and C. A. Terwilliger respectively." [p. 6.]

The lease contained the usual terms requiring the performance of a certain number of shifts of work per month, etc. [p. 71.]

In November, 1918, the corporation, after a period of greater or less prosperity, ceased to function; no work was ever thereafter done by it upon the leased premises; it permitted the machinery, which belonged to the lessor and went with the lease, to be stolen, and allowed the timbering to fall into decay and the mine, which comprised several shafts and lateral workings, to fall into dilapidation. By expiration of the term of the

lease, and by an express declaration of forfeiture, the lease ceased to exist on May 31, or June 1, 1920.

On June 5, 1920, five days after the expiration of the company lease, Dunfee took a lease in his own name. After some considerable gophering around for ore he became discouraged and in October of the same year surrendered this second lease. About the first of the year 1921 the lessor offered him a third lease on more liberal royalty terms, but he refused to accept it on the ground that he was financially unable to perform the requisite sixty shifts per month. The lessor thereupon induced him to go upon the ground and explore it on his own time, with the understanding that if he uncovered commercial ore in justifiable quantity he could have a lease dated back to Jan. 1, 1921. After expense running into thousands of dollars, incurring of debt, and arduous personal toil, Dunfee, in March, 1921, made an important strike. He thereupon sought and obtained the lease involved in this action, dated back to Jan. 1, 1921, as agreed. In July of the same year he found a purchaser at $40,000 cash and 150,000 shares of stock of a corporation to be formed by the purchaser.

Terwilliger and his associates remained absolutely quiescent until Dunfee made the sale. They claim to have been in ignorance of his independent activities over the period from the expiration of the company lease, May 31, 1920, to the date of the strike, March, 1921; but admit that they did absolutely nothing to inform themselves, and, of course, that they did not warn Dunfee of their intention to claim the fruits of his enterprise if there were any, or offer in any way to assist

him. Immediately that the fact of sale became public, however, they, in the name of the corporation, served a written notice on the purchaser asserting title to the proceeds of the sale. The purchaser disregarded this notice, whereupon Terwilliger, after a further delay of some ten months, commenced this action, in April, 1922, repudiating the sale and demanding possession of the mine itself. During the trial his position was again reversed and he sought and obtained a judgment for the proceeds of the sale.

The evidence, without the slightest conflict, establishes to a moral certainty the following conclusions of fact:

1. *That Terwilliger early in the enterprise formed a determination to evade the clause in the pre-incorporation contract requiring him and Dunfee to contribute from their respective personal stockholdings for future financing, and brought about a premature cessation of mine operations, in order that the mine should not be too completely stripped of ore as to hinder stock sales, having expressly in view the sale of treasury shares.*

2. *That having brought about a cessation of mine operations, he began a course of pressure upon Dunfee to get him to agree to a modification of the clause calling for joint personal stock contributions.*

3. *That failing in this purpose, he purposely suffered the lease to expire, expecting that Dunfee would take a new lease in his own name, and intending to claim an interest with Dunfee should such new lease prove a success.*

(1) On August 30, 1917, Terwilliger was seeking a California permit to enable him to sell *treasury* stock [pp. 145-6]. He had then "no idea" of selling his own stock [p. 146]. He sold some 200 shares of *treasury* stock to one John Winkler [p. 147]. In August preceding the closing down of the mine he was frankly intending "to finance it with the 400,000 shares not sold"—the treasury shares. [p. 129.]

He testified:

Q. What was your anxiety to sell stock if you considered that the payment of eight thousand dollars absolved you from any further obligation from (to) the company? A. I didn't consider that, that I had no obligation whatever; I was interested in this property; I was fifty-fifty with Mr. Dunfee, and naturally I wanted to help finance it, and that was my idea for getting the permit to sell the stock and finance the property.

Q. Did you contemplate selling treasury stock? A. That is what I figured on at that time.

Q. You recall that this contract of yours provides that any future stock sales shall be made from your holdings and Mr. Dunfee's holdings, don't you? A. That never was discussed after we started in, that is in anywise that I remember; it is in the contract.

Q. The provision is as follows: (Reads provision.) You abandoned that idea, did you? A. At that time that never entered my head.

Q. Did you abandon that idea? A. That idea never entered my mind when when I wrote that letter. (Witness is referring to letter written in relation to procural of California permit to sell stock, in which he says, *inter alia*, "The principal thing right now is to be able to sell stock, so we can keep money in the treasury, as our funds will soon be exhausted." [p. 145.]

Q. You never had any idea then of selling your own promotion stock? A. At that time when I wrote that letter, no.

Q. You have been telling the court about the 400,000 shares that were in the treasury, by which the company could be carried along; your idea that that 400,000 shares could carry the company had to do with your abandonment of this provision that I have just read, had it? A. No, sir; I don't look at it that way at all.

Q. Were you operating under the theory that you would dispose of the treasury stock, or under the theory that you would operate under this contract? A. I was not manager of the property, and Mr. Dunfee had never submitted to me that he and I would sell that stock as it was agreed upon in the contract. [pp. 146-47.]

* * * * * * * * * *

Q. Now, Mr. Terwilliger, let us go back to where we started: You said you met Mr. Dunfee in Hornsilver, and he told you he was going to shut down the mine, and he then said, "Leave everything to me, I will make money for you all;" tell the court how he was going to make money for you all if he was going to shut the lease down? A. He never mentioned any of his preparations, or anything further than that after the war was over he and Judge (Edwards) and myself would get together and arrange some plan to finance the property.

Q. Then you knew when he said this to you, to wit, "Leave it all to me, I will make some money for you," that there was nothing in view whereby he was to make any money for you, did you not? A. I thought we would get together, and that we would finance the property again; we had plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of

$250,000, and turn the money into the company. [pp. 105-6.]

Later, being shown the company's financial report, rendered on the date of cessation of operations, he explained:

"It shows the company was in debt $200, that the company had 400,000 shares of treasury stock, and the last share of treasury stock I sold I sold at 50¢ a share, and no attempt had ever been made to make disposition or give me an opportunity to associate myself with anyone to use a share of that treasury in financing this company." [p. 136.]

The learned judge below comments favorably on the tenor of Terwilliger's letter of September 30, 1918, demanding the closing down of the mine. This letter in part follows:

"Now would say in regard to this mine, it is my opinion and all of the stockholders here, that under the present war conditions we are only sacrificing every bit of the ore we are taking out of the mine in keeping it running and we are not in favor of your putting up your money in running the property and placing the company under obligations and being indebted to you. * * * It is my advice representing fifty per cent of the stock, that we close down without further delay or sacrificing any more ore or money. * * * We must remember that four of our stockholders who are in our company are fighting in France now, and you, Judge Edwards, myself and the French Company (the lessor) are in duty bound to protect them and to see that their investment, which they have entrusted to us, is absolutely bona fide." [Fol. 15.]

But the learned judge wholly overlooked the motive back of the letter, which Terwilliger divulged as follows:

Q. * * * You told Mr. Dunfee to shut down, didn't you? A. He had told me three or four months before that he intended to close down, then at the final —possibly, I know I wrote to him, and told him that my advice to him would be to close down the property immediately, because we were not realizing a dollar on it, and I thought the property could be financed much easier with lots of ore in sight than it would be to work the property out, you understand, and not have anything in sight.

Q. So your idea was that he should close down in order that there should be a lot of ore in sight? A. If we were going to finance it with the 400,000 shares not sold. [p. 129.]

(2) The purpose of the clause providing for personal contributions was obviously to keep the total outstanding shares down to the original 600,000. And this provision, since it entailed a sacrifice on the part of Terwilliger and Dunfee, was palpably intended for the protection of those whose purchases of stock from Terwilliger—his own friends—provided the original capital of $8,000; yet from the time that Terwilliger accomplished the closing down of the mine, the burden of every one of his letters to Dunfee is, Come to Los Angeles and agree upon a modification of the pre-incorporation clause.

Feb. 18, 1919, he wrote: "If you come down here we may be able to work out some intelligent method for financing the property." [p. 110.]

Apr. 9, 1919: "I want you to meet me in Los Angeles as soon as you can be there, so that definite plans may be made for continuing operation." [p. 113.]

Mar. 26, 1920, two months before the lease expired, Dunfee wrote Terwilliger as follows:

"In regard to Orleans if I can secure a 2½ years lease and option from Judge Edwards (attorney in fact for the lessor) "which I believe I can. Do you think you could take the old Co. and get the money by selling stock to work it. We start out on a new Basses I got wise to the stock game

"I have looked the state over and there a better chance on the Orleans than any thing I saw War times upset us Wire or write me what you are willing to try and do—or what you think could be done—the inducement are better now than ever before. We eventually get in our own mill * * *." [p. 84.]

Notwithstanding the imminence of the expiration of the lease, Terwilliger delayed his reply to this letter for thirty-six days, then, on May 2nd, wrote:

"Your letter of some time ago received and I have been away, hence delayed in replying to same. When will you be in Los Angeles to confer with me regarding this matter of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on. Very glad to hear your health is so much improved."

But even more to the point is the following memorandum, initialed with Terwilliger's initials, written on the back of Dunfee's letter, to which Terwilliger's May 2 letter was a reply:

"Ansd. Mch. 30/20 and stated would not raise any money on the old line, and would not make any agreement about this matter by letter or wiring. Told him to come to Los Angeles and we would go into the matter in detail and come to some understanding for financing. C. T. A."

There was no further correspondence between the two.

(3) Terwilliger's suffering of the lease to expire was characterized by elaborate deliberation.

His attention was called to the following allegation in the bill of complaint: "Also, that he, the said Dunfee, was on very intimate terms with said French Company (the lessor), and particularly with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could and would obtain any renewal or extension of said lease, also option to purchase said mining claims, that might be *desired* by plaintiff, the defendant Dunfee, or the corporation to be formed;" and he admitted:

"I never at any time told Mr. Dunfee or ever expressed the desire to have the first lease extended after the lease shut down. I never had dictated to him about the lease."

Q. I am not asking you whether you dictated; you have used the word "desired" here; you say that he was to get an extension that was desired; now the lease shut down in November, 1918? A. Yes, sir.

Q. Tell the court when after that that you expressed a desire to have the lease extended. A. I can't say that I ever conferred with him.

Q. Can you say that you never did express that desire? A. I never made a demand on him about getting extensions at all.

Q. Now you say also that the extension was to be procured if the corporation desires; can you tell the court at any time after that lease shut down that the corporation expressed a desire for an extension of it? A. Never in writing, I don't think verbally we ever did.

Q. Take that paper again and I will read a little further down: "And wholly trusted and depended upon the said Dunfee, and believed and relied on his statements that he alone could obtain such extension or renewals and that he would obtain same after the use and benefit of said corporation *whenever deemed desirable or necessary.*" You add the word "necessary;" do you know of the corporation ever taking any action in which it declared it necessary that that lease be extended? A. No. [pp. 120-1.]

His complete paralysis of initiative was, moreover, in the face of a sharp warning from Dunfee. The latter, after stating that he had written two letters to Terwilliger in April, 1919, one of which had not been produced, testified:

"I did not retain a copy of that letter; wrote it just in longhand. I stated in effect we had to get to work on the Orleans property, as he knew we had to do sixty shifts by the last of May if we expected to hold the lease; that there was no money in the treasury, that we had to raise money, and I had paid up back bills, and the company was already indebted to me in the amount of $400.00. That is practically all that I remember of the letter. *I have since seen it in the possession of Mr. Atkinson after Atkinson became Mr. Terwilliger's attorney.* In it I was telling Mr. Terwilliger if he would

come up we would get a new lease, but we would have to go to work, and I haven't talked the terms with Judge Edwards, but just stated we would take a new lease, and for him to come up; and after I had talked the terms over with Edwards, he said he would give us a 2½ years' lease if Mr. Terwilliger would come up and go to work, but that we could not bluff any longer, we had to go to work. Then I notified Mr. Terwilliger of that in my March 26th letter. His answer to the March 26th letter, dated May 2, 1920, is the last communication I ever had from him." [p. 272.]

Counsel, after a search [p. 271], stated that they were unable to find the letter thus summarized by Dunfee. Atkinson was not produced. Terwilliger testified:

Q. Did you receive a letter from Mr. Dunfee in 1920, in which he said, "You know as well as I do we have to do sixty shifts a month?" A. I *don't remember* that letter.

Q. Well, did you or did you not receive such a letter? A. I *don't remember* of having received such a letter, where he said you know as well as I do we have to do sixty shifts a month; I *don't remember* of ever receiving that letter, I *don't think* I did. [p. 158.]

Always, while trying to force Dunfee to submit to a modification of the pre-incorporation agreement with respect to stock sales, he had in mind holding Dunfee to it in every other respect.

Q. You knew the lease could not run without money, didn't you? A. I suppose.

Q. You knew that if you and Dunfee and Edwards didn't get together and arrange for money, that the lease would not run, didn't you? A. Yes.

Q. What did you expect would happen to the lease,

that it would be continued indefinitely without any work being done on it? A. No, sir; I figured I had put my money in there, and that I had assurance from E. Carter Edwards, his final remark to me was, you go back to Imperial Valley and tell your stockholders not to worry, that their investment will be protected in every way; that was in 1918, about August 3 or 4, when we were leaving Hornsilver; that was my assurance from E. Carter Edwards, secretary of the company, and I naturally had faith in Mr. Dunfee and him, and supposed they were two of them, and I was alone, that they would come where the money was forthcoming when they wanted the money; they were there together before, and everything was fine, and I was treated with the utmost respect; after I put the money in, after I made the protest, after I had put $8000 in and I raised a protest I was insulted—

Q. Never mind, you have answered the question. To get back to the question I asked, how did you expect the lease to run without money? A. I didn't; and I expected to help finance that property, if they would come where the finances were; I considered it a waste of time to go to Goldfield to raise money, because I didn't consider it was there.

Q. Did you expect the lease to be indefinitely extended without any work? A. I didn't expect it to be indefinitely extended without any work, but I will tell you what I did expect.

Q. All right. A. *I expected whenever that property was in the name of J. W. Dunfee, that me and my stockholders stood fifty-fifty with J. W. Dunfee,* that was my direct understanding in this proposition, and the only understanding I ever had, and I never sold a share of stock to the stockholders without citing them to the fact that I was fifty-fifty with J. W. Dunfee; that was

my statement to them in detail, and that I would never be thrown out.

Q. Now listen to this question: You stated you knew the lease could not run without money, and you stated that you knew the lease could not run indefinitely without work; when did you expect that lease to cease? A. I expected, as I told you, to help finance that property?

Q. When did you expect the lease to cease? A. I expected at all times if Mr. Dunfee had anything to do with that property to be protected.

Q. Is not this the situation, Mr. Terwilliger, that you were simply holding Mr. Dunfee to any property that he might ever get on that Orleans ground, whether it was under this lease or any other instrument; that is your position, isn't it? A. My understanding with—

Q. Never mind; what was your position? A. I am going to tell you my position with Mr. Dunfee, if the court will allow. *My position with Mr. Dunfee was, and my understanding with him, that as soon as he ever got a lease or purchased an option or anything on that property, I was fifty-fifty with him;* that is why he took three thousand dollars, and used five thousand dollars for development; I bought my interest in the property, *in the futures,* and he took three thousand dollars, and it is referred to in a letter where they wanted him to kick me out, as they were sore because he had given me one-half. [pp. 116-119.]

* * * * * * * * * *

"I claim that for eight thousand dollars I paid to Mr. Dunfee I have a fifty per cent interest in anything that he might acquire in the indefinite future on the Orleans property; that is my idea." [p. 142.]

* * * * * * * * * *

Q. From October 10, 1918, to May 31, 1920, why didn't you go to Hornsilver and find out if the lease was

in operation? A. Because I wasn't president and general manager of the company, *and my contract was with the president and general manager* of the company, that is why I didn't do it, had I been president and general manager you can rest assured I would have been there.

Q. You hadn't any reason to suppose that any work was going on, had you? A. I didn't have any reason to think it was, I—

Q. You knew the treasury was empty, didn't you? A. Yes, I believe he told me when we were up there, there was about nine hundred dollars in the treasury, when we were there in 1918.

Q. You knew the property wasn't self-sustaining, didn't you? A. Yes, sir.

Q. And you knew that the lease would expire by its own terms, assuming that it was extended on August 1, 1918, would expire by its own terms on May 31, 1920; that is right, isn't it? A. Yes.

Q. And you never went near it? A. But I knew also that I was protected, and my stockholders were protected, because the thorough understanding if Mr. Dunfee had in fact gotten that property in his own name we would have been loser, *I understood all that, my stockholders all understood that as soon as Mr. Dunfee ever acquired that property I was selling them an interest in, that I had fifty-fifty*— [pp. 128-9.]

* * * * * * * * * *

He is no less frank about his attitude after the lease expired.

Q. From the *date of expiration* of that lease until you discovered the facts of this lease, or the facts on which you base your complaint, was thirteen months, wasn't it? A. I just didn't get that.

Q. I will have it read. (The reporter reads the

question.) A. Yes, sir, it was I think in the light *(sic)* of 1921.

Q. What interest were you taking in the Orleans property in that thirteen months? A. Well, I had never received any communication from Mr. Dunfee.

Q. What interest were you taking in the property? A. Well, I was just—I can't say I was taking any interest, that is, in the way of operating, or active in any way.

Q. What interest were you taking in the property? A. Well, I wasn't doing anything; I don't think I wrote any more letters, or sent any more letters during that time; *I thought I would eventually hear something from Mr. Dunfee, that is the way it stood; I hadn't heard anything.*

Q. *What made you think you would hear anything from him?*

A. *Because I was fifty-fifty in the property.* [pp. 155-6.]

* * * * * * * * * *

Q. *Your idea was if he ever in the future got an interest in the Orleans, then you would spring your fifty-fifty interest on him?* A. *Yes, sir.* [p. 157.]

From the time of the cessation of operations until June 1, 1920, the company's tenure was one of mere sufferance or tolerance. Referring to the statement in the August 1, 1918, report: "The owning company has given its consent in writing directing Mr. E. Carter Edwards to extend the lease for another year, that is to June 1st, 1920, which will be done," Edwards testified: "I never as a matter of effect (fact) extended that lease because the mine shut down after that" [p. 306], but "I did no acts to cut off the stockholders' rights until that

paper (the report) had expired, this is, until June 1, 1920. Then I exercised my right for the benefit of the company. The property was dilapidated, going into decay, and it would take thousands of dollars and I must and I did exercise my rights positively then in favor of the company. It would have been going on until now, and I would have had no mine. The property was being stolen, the stopes had fallen in."

Q. You consider that the Orleans Mining & Milling Company under this paper, Plaintiff's Exhibit 3, had rights to the property until June 5 (1?), 1920? A. I did, and I didn't violate any rights that they could have exercised up to that time.

Q. What kind of rights do you mean that you understood they had there up to June 1? A. The right to operate the mine.

Q. Under the old lease? A. Yes.

Q. And that is why you didn't do anything towards protecting the French Company, as you put it, by putting somebody in charge there and working until June 5, 1920? A. Yes, practically; I had warned Mr. Dunfee to communicate with Mr. Terwilliger, and to start it up, and I had offered to give another and new lease, two and a half years and 20% royalty, to do anything I could to get mining started. It was going a long time, the mine was getting in bad shape and I would have taken Mr. Terwilliger and his company on a new contract if they had come up and made a showing. [pp. 310-11.]

The natural and timeworn sequel to Terwilliger's evasion of his duties follows, and he is of course found denying that he had any knowledge of Dunfee's independent activities until July, 1922, more than a year

after these activities commenced. It had been his practice, while the mine was in operation, to keep privately advised by correspondence with an employee in the mine [pp. 169-70]. He knew by Dunfee's letter of March 24 that Dunfee wanted to, and had said that he thought he could, obtain a lease or extension of two and one-half years and that Dunfee had "looked the state over and (thought) there is a better chance on the Orleans than anything I saw." He knew of Dunfee's faith in the Orleans. He knew, as he alleges in his bill of complaint, that "Dunfee was on very close and intimate terms with said French Company (the lessor), and particularly with the said E. Carter Edwards, who was the agent and attorney-in-fact for said French Company, and that because thereof, he, the said Dunfee, could * * * obtain any renewal or extension of said lease." He admits and professes that he intended to claim a "fifty-fifty" interest in any lease Dunfee might get on the Orleans. He says that he at all times had his interest in mind, and that he was suspicious of Dunfee before and after the company lease expired. [p. 166.] He says he expected to hear from Dunfee, and did not hear from him. He kept himself informed of Southern Nevada mining affairs. He testified: "I did not take any newspapers from the southern part of the state, but I used to read the Goldfield papers and Reno papers quite often when I would be in Los Angeles; the 'Goldfield Tribune,' whatever the papers are there; I remember I read them once in a while, but I wasn't a subscriber to any Nevada paper. I would go to the news-stand and buy them once in a while. I didn't make a practice of

it; Mr. Dunfee sent me several papers, at different times while the property was running. My idea in getting the Southern Nevada papers from the news-stand was that I was interested in Hornsilver, and I was also interested in that state, that is, in a general mining way, and I would get the papers and look them over. I can't tell you how long I continued to do that; there was no definite time, no practice established." [pp. 170-1.] But he says that he did not see a Goldfield paper of April 16, 1921, containing an article headed "Dunfee Breaking Ore Nine Feet Wide at Hornsilver," nor one of May 28, 1921, containing an article headed "Orleans Ore Body, Seven and a Half Feet High," nor one of June 18, 1921, containing an article headed "New Find Is Made in Orleans Mine, Four and a Half Foot Wide of Ninety-dollar Ore Opened up on the 580-foot Level," nor one of June 25, 1921, containing an article headed "Shoot in Orleans Mine Is Over a Hundred Feet Long, Seven-foot Face of Forty-dollar Ore Now Being Broken by Lessee;" but he did immediately see a copy of the Tribune of July 16, 1921, containing an article headed "Sale by Dunfee Is $90,000 Mine Deal." [pp. 173-4.] In other words, he remained in total ignorance, and missed all of the newspaper accounts, of Dunfee's activities as long as there was a chance of his being called upon for a contribution; the instant that that chance was averted by the sale of the mine he found a newspaper account of it and was on his way to Tonopah to foment this litigation.

But it is not necessary to leave the matter of notice wholly to inference. Dunfee was trying in July, 1920,

to interest one Harry McMahan in his newly acquired lease [p. 253]. Mrs. Dunfee testified:

"I saw Mr. Terwilliger in 1920, August, I believe it was, in Los Angeles at about Fourth and Broadway street. We shook hands and he asked me if I had heard from Mr. Dunfee, and I told him no, and he said that he heard that Mr. Dunfee was about to sell the mine or the lease, I don't know which, to a Mr. McMahon, and he said if he did that he would land him in the pen." [p. 342.]

The foregoing was introduced partly by way of impeachment, and in laying the foundation for same Terwilliger was asked:

Q. Did you ever at any meeting with her speak to her about Mr. Dunfee's operations on the Orleans, and with respect to one Harry McMahon? A. Never; never remember mentioning Harry McMahon.

Q. You don't propose to say that you didn't mention him, do you? A. I say I never mentioned him *that I know of;* never.

Q. Did you ever hear of Harry McMahon? A. *I can't recall* who he is now.

Q. Did you ever hear of him? A. *I don't know;* I can't place him; can't tell who he is, Harry McMahon; would not know him if he was brought in here; could not identify him; don't know who he is connected with; don't know him.

Q. Did you ever hear of a mining man named Harry McMahon? A. McMillan?

Q. McMahon. A. No, sir; can't place the man at all.

Q. Didn't you say in effect to Mrs. Dunfee, at that time, you understood Mr. Dunfee was dealing with

Harry McMahon, or with McMahon on the Orleans? A. No, sir.

Q. And that if he sold the Orleans you would put him in the pen, or something of that sort? A. No, sir. [p. 168.]

It further appears that in April of the preceding year, 1919, Mrs. Dunfee, according to her testimony, had a conversation with Terwilliger in Los Angeles in which, as she quotes him, he said that he had Dunfee tied up in a contract whereby if he sold the mine or the lease he would put him in the pen. Mrs. Dunfee testified: "I don't know whether I told Mr. Dunfee exactly those words or not; but Mr. Terwilliger also said that if Mr. Dunfee came into California he would attach his automobile and I told Mr. Dunfee that in a letter." [p. 341.] That same month Dunfee wrote Terwilliger: "I'll excet (accept) your conversation with Mrs. Dunfee as your true feeling toward me." [p. 153.] As to this conversation Terwilliger testified: "I think I have had some conversation with her at the time she referred to, that *I might have said something while I was angry, I don't know what I said.* I did not say anything to the effect that if Mr. Dunfee came to Los Angeles I would have him put in the pen or to the effect that if he came to Los Angeles I would have his automobile seized. I never said anything like that to her at all." [p. 154.]

Moreover, Terwilliger's testimony is too conspicuously lacking in the candor expected of a party invoking equitable relief, to entitle his bald denial of notice to much weight. He says, in an attempted justification of his inertia, that in a conversation between himself and wife

and Edwards, "We discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he (Edwards) said that it would apply on future extensions." [p. 98.] Immediately after this conversation [p. 125], in the course of which Edwards had promised an extension of the lease to June 1, 1920, Edwards drafted a circular letter to the stockholders, which Terwilliger signed, commenting on mine and market and war conditions and broadcasting the glad news of the lease extension, but unaccountably omitting any mention of this important and unprecedented concession with respect to past work. [p. 78.] Edwards flatly contradicts the Terwilligers on the point, and in Terwilliger's letter of September 30, 1918, demanding the closing down of the mine, Terwilliger purports to state every reason known to him in support of his demand, but unaccountably omits to mention this concession. [p. 17.] He omits to mention it in any of his ensuing correspondence with Edwards and Dunfee and he omits to mention it in his bill of complaint, which purports to set forth his entire grievance. That such a concession was made is inherently improbable; it was never heard of in the case until Terwilliger took the stand, and even if made was of no further significance after the lease expired. The only other reason assigned for his apathy is the alleged statement of Dunfee at the mine in 1918: 'Now, Cal, you leave it to me and everything will be all right, I will make us all some money" [p 99], and the alleged statement of Edwards at the same time and place: "Now, Mr. Terwilliger, you go down to Imperial Valley and tell the stockholders not to

worry about their investment, that their interest will be protected in every way." [p. 207.] But Dunfee and Edwards deny that they said these things, Terwilliger admits that Dunfee was then discouraged with the ore outlook and contemplated closing down, and that what he understood by these optimistic promises was: "I thought we would get together, and that we would finance the property again; we had plenty of stock, lots of stock never had been disposed of, the treasury had never been sold, to sell the stock and put a price on the property of $250,000, and turn the money into the company." [pp. 105-6.] Terwilliger swears that he never believed anything that Dunfee ever told him [p. 103], yet according to his verified bill of complaint he believed everything that Dunfee told him, and when challenged to state a single instance in which Dunfee had been anything but perfectly frank and honest with him, he was forced to resort to evasion. [p. 103.] He produced and allowed counsel to read in evidence a letter which he said he sent to Dunfee and was later compelled to admit that the letter was returned to him by the Post Office Department undelivered. [p. 108.] He seemed to be utterly insensible of the breach of faith involved in his attempted evasion of the provision of the pre-incorporation contract requiring him and Dunfee to contribute equally of their promotion stock toward future financing. [pp. 145-6.] He pleads in his bill of complaint and he swears in his testimony [pp. 121, 123] that he never personally concerned himself with obtaining lease extensions, yet he and his wife are found together and alone with Edwards when the August, 1918,

extension is granted, Dunfee being away in Hornsilver at the time and the Terwilligers being unable to give any plausible reason for their presence in Nevada at the time except the business of obtaining said extension [pp. 123, 210]. He says that he didn't even suggest the extension, but that Edwards, who was running for office at the time, volunteered it as well as the concession with respect to past work in a burst of political exuberance [p. 124]. He couldn't recall whether or not he had seen a ten-page, single-space typewritten letter written by Edwards to Mr. Cooke, Terwilliger's counsel, containing a minute history of the matters involved in this action [p. 126]. He admits that in a conversation in Hornsilver Dunfee accused him of trying to "gyp" Dunfee out of some of Dunfee's stock, but is able completely to evade a revelation of his part in this conversation [pp. 149.50]. He "does not remember" whether the stockholders met once or twice in Los Angeles [p. 159]. It "seems to him" that he remembers that at a meeting of stockholders it was resolved that all future stockholders' meetings be held in Los Angeles [p. 161], yet it is obvious that this resolution was passed for his own accommodation. He "thinks" he attended a meeting in Los Angeles [p. 161]. He doesn't "think" that any regular meeting of stockholders was held after the mine shut down [p. 162]. He admits that his only reason for charging Dunfee with concealment was Dunfee's failure to write him after Mar. 26 [pp. 164-5]. He doesn't "think" that Dunfee wrote him, doesn't "remember" that he wrote Dunfee, after that date [p. 165].

No one of Dunfee's verbal or written statements concerning the mine conditions and prospects is challenged throughout the trial. An outstanding fact in the case is that he gave his associates the benefit not only of everything that he knew about the mine but of everything that he hoped for it. The learned judge comments on the fact that Dunfee's mine activities were along lines suggested by his previous experience in the premises, but he fails to note that these lines were called to the attention of the corporation, its stockholders and officers, in written reports over Dunfee's signature as president and general manager. No one more freely admits Dunfee's impeccable candor than Terwilliger himself. The latter's attention being called to the verified statement in his bill of complaint that "in truth and in fact the mine showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," he was asked: "Is that a fact?"

A. That was the intelligence that he gave me on the property when he conferred with me by letter, that it was the best property that he had seen, and the chances were better than any place; he had been all over the state, and that the chances on the Orleans were better than any place he had been; that was the intelligence I received, my last communication through letter from Mr. Dunfee was that it was the best property in his opinion that he had seen; I based every bit of my confidence in this property on Mr. Dunfee's judgment at all times; my personal judgment on this property was never instrumental in my financing this property at all, it was Mr. Dunfee's.

Q. Was it a fact that the mine showing continued to improve, so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously? A. We had done a great deal of development work there, the Orleans Mining and Milling Company had.

Q. Answer the question; is it a fact? A. I can only answer that by the intelligence he gave me in 1918, that it was the best property.

Q. He didn't write you the mine was improving? A. He wrote me the chances were better there than any other place he had been.

Q. Did he tell you the mine was improving? Haven't you told the court you knew the mine was idle for twenty months? A. Beg pardon.

Q. Haven't you told the court you knew the mine was idle for twenty months? A. Idle for twenty months?

Q. Up to the time of the expiration of the lease? A. Yes, I think I made that statement.

Q. Well, is it a fact that the mine's showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously? A. Well, I base my—

Q. Well, is it a fact? A. It must be a fact; Mr. Dunfee advised me that the chances were better there than any place he had been, and I based my opinion on Mr. Dunfee's judgment of the property, and if I raised any more money it would have been entirely on Mr. Dunfee's judgment of the property. That was the intelligence that I received from Mr. Dunfee, that it was the best property he had seen, and he had looked over all of it, and that the chances were better there for a paying mine than any place he had been. [pp 137-8.]

No evidence whatever was offered by plaintiff in support of the issue of concealment or the issue raised by the allegation that "in truth and in fact the mine showing continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by defendant;" but Dunfee nevertheless took the burden of establishing the negative of these issues.

H. McMahon, a practical mining man of ripe experience, who visited the mine in July, 1920, with a view to interesting himself in it [p. 253], testified that the mine showing would not justify "any payment." He said: "Mr. Dunfee made no representations of ore, and I saw none. I won't say that exactly; there was some ore there, but there was no tonnage" [p. 254]. A. I. D'Arcy, who purchased the mine from Dunfee a year later, whose qualifications as a mining engineer were admitted [p. 256], and who accompanied McMahan in the latter's examination, testified: "I came to the conclusion that there were no ore bodies in sight in the mine, that is, of the commercial grade of ore that we were looking for, and at that time I remember of taking a few samples just simply to verify that opinion; I don't think there were very many of them. I think there was only four or five."

Q. You say there were no ore bodies; was there any mineralized ore in sight? A. Yes, there was quartz; there was the ordinary vein filling that you find in this particular character of veins.

Q. Now I ask you to compare the work on that 600-level done by Mr. Dunfee after the time you were there,

that you have just described, with the rest of the work in the mine. A. Well, that was very much higher grade stuff, I know, because I had the privilege of sampling it, and finding that it was a very much better grade, and subsequent sampling that has been done in the mine has proven that those upper exposures were of low-grade stuff, low-grade material.

Q. Did you measure that additional work done by Mr. Dunfee? A. I think I did; yes.

Q. To what extent was it sampled? A. Well, every five feet, it was sampled very thoroughly.

Q. Can you tell the court on the strength of what you entered into the deal with Mr. Dunfee that is involved in this action? A. It was entirely on the showing beyond the point of the drift in July, 1920, and what I saw, I think it was in April, 1921; in other words, it is the point just beyond the red vertical line, that is taking into consideration my objection to the red line not being quite far enough this way. [pp. 260-61.]

(The "red vertical line" marked the point where work under the company lease stopped and where Dunfee's independent activites began.)

Gordon Bettles, a mining engineer, testified that in October, 1920, he made a "thorough examination of the property, covering almost two days, and did some sampling" [p. 261]. "My examination was with respect to values in sight if there were any such. I did not find any that I could consider of commercial value." [p. 262.]

Wm. Sirbeck, a mining man with experience in mine examinations, visited the property in Jan., 1921. He did not find any bodies of ore; found some mineral; took two assays running under ten dollars. He testified: "As the result of my examination, I rejected the prop-

erty on the ground that I didn't feel like paying any cash for something without any commercial ore in sight." [pp. 263-64.] McMahan had refused to entertain an offer of the property at $6000. [p. 253.] Bettles had refused to pay $2000 cash and 20% interest in a company to be formed to finance and work the property. [p. 262.] The deal with Sirbeck was for $2500 flat. [p. 263.]

There is no evidence in the record to offset the foregoing showing, not even from Terwilliger, who says (speaking of a time when the company lease was in operation): "I was down in the mine I think three or four times. I know something about practical mining. I know how to catch up ground, and protect the ground, and do general mining, and raising and stoping and sinking, and almost everything there is about mining, running a hoist and those things. I myself mined for a number of years." [p. 144.]

Dunfee's account of his independent activities, commencing at page 273 of the secord, follows:

Q. How did you come to take the June 5th, 1920, lease? A. Well, we could not get any satisfactory letters from Mr. Terwilliger, nothing of the kind, and the lease had run out, it had been cancelled a year before that.

The Witness.—Continuing.) The circumstance that led up to my taking the lease was, Judge Edwards asked me if I would take a lease on it and go to work. I wanted to test—wanted to do some work on the 300-foot level. I went to work about a week or ten days or two weeks after taking the lease. At first I employed a

Mr. Burke and Mr. Mitchell as miners, and I was working myself. I was paying Burke and Mitchell out of my own pocket. I worked them until Mr. McMahon (previous witness) was about to buy the lease in July, then we closed down for while; these two men and I worked about two months and a half and that took me up to the time Mr. McMahon came to examine, and I did about twenty days work at that time. After Mr. McMahon had been there I continued the work with Burke and Mitchell for the balance of the terms of two and a half months—that is the idea I desired to convey; [215] two and a half months all told. That was all at my own expense and I was working myself, sharpening steel and going down the mine. After I closed down in August of that year—1920—I made a trip to Los Angeles with the view of financing the whole camp. That was the last of August, 1920; then the 2d day of January, 1921, I went back and went to work alone in the mine. I hadn't been there from the last part of August until January 2d of the next year, 1921. The result of my work with Burke and Mitchell was nothing, we found no ore. I did 137 feet of work. When I returned in January I went to climbing the shaft and worked all alone at the 600-foot level; I first drove in a drift about ten feet on the 600-foot level at the point where the Orleans Mining & Milling Company left it. That is southeast of the line drawn by Mr. Downer on the map in evidence. The June, July and August, 1920, work was on the 350-foot level. I didn't start on the 600-level until I went back alone in January, 1921. I worked two months and sixteen days alone on the 600-level, except one man worked about five days with me during that time. He worked at my expense. I did at that time while working alone about 70 feet of work. Sometimes I had to go up and down the shaft twice a day; worked until eleven o'clock at night; got up early

in the morning, and after the showing got to be good, got in some low-grade ore, I would come back on that night and stay until eleven o'clock. That carried me up to the 15th day of March, 1921. I then had some ore in sight; thought I could pay the men if I put them on, so I arranged for Joe Vernon, Andy Krion and Westfall to muck out the ore that I had stored in there; I had the drifts stored full; could hardly get in there, and worked 18 days, taking chances for their money of my getting out a shipment of ore. I also told them that if they didn't get the shipment out I had a life insurance I would put up; they would be sure of their money if they would just give me a [216] little time. While they were mucking I was running the hoist. After they got the muck out I had to drift about 30 feet where I had found the ore in an incline upraise into the hanging-wall side of the vein. (Witness indicates point on map, pointing to line made by Witness Downer.) It does not appear on this map except by that portal to which the Downer line runs. (Witness marks letter "c" on the plat to indicate southeasterly work.) Then I raised about 12 feet into the vein, on the incline, then drafted about 8 feet in the vein up there in that cross-cut, and then at the end of that I raised up, and there is where I got the ore, about 8 feet. That was the first ore that looked like pay ore that I got after I took the second lease. I did this working there alone, this gopher hole. It was afterwards that I employed men to muck and they mucked out, and I drove a drift under this other work. I went ahead with the work, kept on drifting southeast, underneath the work I last described on the map, about 130 feet all told. That took me to the end of the cross-cut as indicated on the map. That is 130 feet from where I commenced near the Orleans Mining & Milling Company stope. That is 130 feet from the Downer

line on the map. My first carload of ore brought in about $234.00; it didn't pay; just able to pay my powder and gasoline and keep on working. I got out the first carload of ore about the middle of April, 1921, and then I gave an option to the Tonopah Mining Company and we didn't do any work for about three weeks. I spent all the time then sampling the mine, and running the hoist, while Mr. Carper, who represented the Tonopah Mining Company, and the force of men were sampling the mine. I do not know where Mr. Carper is. He was in Utah the last time I heard from him. The Tonopah Mining Company spent about five weeks all told sampling the property. They sampled it in ten-foot blocks; where there were indications of ore, took some 334 samples. This was in order to see whether [217] or not they would purchase the property. Their work took into about the middle of May, 1921. After they told me they would not pay any money down for the property, I got my men together again and went back to work at my own expense, and I had no money to pay them, and I told them they had to take chances on the ore or my life insurance for this money and they all agreed to. I worked myself and continued working myself continuously until I sold out to Mr. D'Arcy. After I got in where I began to take out ore I had 5 or 6 men. I shipped about $5,000.00 worth of ore before I closed with Mr. D'Arcy. This ore netted me about $5,000.00, the ore I shipped, but it didn't pay out all bills and back things I owed for operating the mine on my own account. I was still in debt about $1,000.00 when I sold to Mr. D'Arcy. I did not at any time after closing down the lease of the Orleans Mining & Milling Company, or before its closing down, practice any concealment of any kind toward Mr. Terwilliger or anybody connected with the company.

Finally, Terwilliger's laches, from July, 1921, when he admits he learned of Dunfee's sale of the mine, to April, 1922, when this suit was commenced, remains utterly unexplained. August 2, 1921, he notified Dunfee and the purchaser in writing that the Orleans Mining and Milling Company "claims all money and shares of stock which said J. W. Dunfee is to receive," etc. [p. 181]. Thus matters stood until this suit was commenced, when Terwilliger, after nine months of deliberation and investigation, concluded that he did not want the money and stock but would take the lease itself Another eight months elapse and this case comes to trial, whereupon Terwilliger changes his mind again and decides that he will return to his first preference and claim the money and shares. His entire explanation of his delay given on direct examination follows:

"I went to Tonopah and employed Mr. Atkinson to look into the matter, and he took up the case, and he made a trip or two to Goldfield and he didn't do anything, so I afterwards arranged with other counsel; it was several months before he notified me that he could not go on with the case, and then I secured the services of Messrs. Cooke, French & Stoddard. I think that was in March of this year." [p. 100.]

It appears on cross-examination that he employed Mr. Atkinson in about the middle of July, 1921. In September, 1921, Mr. Atkinson notified him "that it was impossible to go on with the case along the lines we had outlined." He then waited until March, 1922, to release Mr. Atkinson and employ present counsel. His cross-examination in full on this branch of the case follows:

"I employed Mr. Atkinson as counsel in the beginning. I could not stipulate just what to do, because I would not be the dictator of his action. He was my counsel up to a certain time; that was just before I employed Cooke, French & Stoddard. Arrangements were made for his services satisfactory to him. I employed Mr. Atkinson as counsel in the beginning, and at such time as he notified me, *up until September*, that it was impossible to go on with the case along the lines we had outlined; *then I immediately employed Cooke, French & Stoddard.* Mr. Atkinson outlined some plans as my counsel. That notice is the procedure; then from time to time I had letters where he would try to get intelligence on the case; that was about the nature of the procedure. *It was quite a few months before I concluded to change counsel—from the middle or latter part of July until March of this year*—until I released him as counsel and notified him that I was going to consider other counsel if it was agreeable, and he approved it. I employed him to investigate in detail and I deemed he would do whatever he considered necessary as my counsel. I think he applied to Mr. Edwards for leave to examine the corporate records and papers pertaining to the case. I think I signed a letter authorizing Mr. Edwards to show him everything. I think he looked at the books and everything a very short time after I employed him.

"Q. Do you know whether or not he encountered any concealment on anybody's part?

"A. Well, I don't think he ever mentioned to me anything about these letters you have shown me here, or anything of that kind.

"Q. Did he find a disposition on anybody's part to conceal anything from him? A. I don't know." [pp. 183-84.]

Mr. Atkinson was not called.

A written opinion was delivered by the court below after over three years of deliberation. Throughout it there is not even an intimation of actual fraud on Dunfee's part. The learned judge says that "the mine was self-sustaining," but this is contrary to the direct averment of the bill of complaint [p. 10] and to all of the evidence. He says that "Dunfee's mining appears to have been on the six or seven hundred foot level of the mine, and was not of a character to attract attention." This is the nearest to an intimation of concealment on Dunfee's part, if it was so intended, but it takes no account of the sensational newspaper publicity given Dunfee's activities. Terwilliger's extraordinary remissness, his admitted flagrant violations of contractual and corporate duty, are totally ignored. Preposterous as the statement may sound, the opinion can stand only if it be the law that a corporate officer can never under any conceivable circumstances acquire an independent right in anything that the corporation ever owned, and that a lessee must be conclusively credited with an expectation of a renewal of his lease, although he most manifestly does not in fact want it renewed.

The judgment requires Dunfee to turn back $40,000, whereas up to the time of the trial he had received but $20,000.00 [p. 228]; and it allows him nothing for his risk, expense, time, or labor. Moreover, it runs to Terwilliger personally, instead of to the Orleans Mining and Milling Co., for whose use and benefit the action is prosecuted.

(Lest the above statement with respect to Dunfee's receipts mislead, we venture out of the record to state that he has since the trial received an additional about $9000, leaving still due him about $11,000, in which latter amount only, therefore, is the judgment now excessive.)

SPECIFICATION OF ERRORS.

1. Said decree is erroneous and contrary to the pleadings in this, that plaintiff's complaint sets forth facts which, if true, entitle him, if anything, to a decree adjudging, and plaintiff in the prayer of his complaint specifically prays judgment, that the Orleans Mining & Milling Co. is the owner and entitled to the possession of a certain mining lease dated June 5, 1920, and the leased premises, and a certain "modification, renewal and extension" thereof dated January 1, 1921, whereas by its said decree the court adjudged that certain 150,000 shares of stock and $40,000.00 in money were received by defendant Dunfee as trustee for plaintiff and that he deliver and pay the same to plaintiffs. [43]

2. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this, that the complaint charges that defendant Dunfee sold said lease to the Orleans Hornsilver Mining Co. upon the agreement of the latter to "pay to said defendant Dunfee, in installments from time to time an aggregate of $5,000.00 in cash and 150,000 shares of its capital stock"; the evidence shows without conflict that said money consideration was $40,000.00 payable in installments, of which but $20,000.00 had been paid; nevertheless the said decree adjudges that defendant Dunfee pay and deliver over to plaintiff $40,000.00 without deduction.

3. Said decree is erroneous, unsupported by the pleadings, and contrary to the evidence, in this: that it adjudges that defendant Dunfee received said stock and money as the purchase price for a lease in which the Orleans Mining & Milling Co. was interested as lessee, whereas the evidence shows without conflict that the only lease in which said company was interested, to wit: the lease of June 19, 1915, expired by its own terms

on May 31, 1920, and was moreover expressly cancelled by the lessor on May 30, 1920, for the total failure of the lessee for over nineteen months to perform any condition thereof.

4. Said decree is erroneous, unsupported by the pleadings, and contrary to equity and the evidence, in this: that it adjudges that defendant Dunfee, as an officer of the Orleans Mining & Milling Co., received said stock and money as the purchase price of a lease in which said company was interested, whereas the evidence shows without conflict that after the lease owned by said company expired by forfeiture on May 30, 1920, and by lapse of time on May 31, 1920, defendant Dunfee, on June 5, 1920, took in his own name and right a new lease which he abandoned in October, 1920, after several months' unsuccessful effort at his own expense, labor and risk to discover commercial ore thereunder; that in [44] January, 1921, he reluctantly, at the instance of the lessor, re-entered the premises under a parol tentative arrangement with the lessor that if, after further exploration, he felt justified by the ore showing in requesting a written lease on better terms he could have it; that after several months further effort at his own risk, labor and expense he, in March, 1921, discovered ore justifying such request; that said parol tentative agreement was then consummated by the giving to him of a written lease dated back to the date of his last entry, to wit, January 1, 1921, and the same is the lease which he sold to the Orleans Hornsilver Mining Co. for said money and shares.

5. Said decree is erroneous, contrary to the evidence and against law and equity in this: that it necessarily implies a finding of fact and conclusion of law that because defendant Dunfee was the onetime active, and may be still the nominal, president, etc., of the Orleans

Mining & Milling Co., he can forever be held to a duty to said company, while the said company, as shown by the evidence without conflict, wholly ceased since October, 1917, to function as a corporation, thereby wholly failing in its reciprocal duty to defendant Dunfee so to function.

6. The evidence shows without conflict that defendant Dunfee, as the owner of a leasehold estate in the Orleans mine, assigned the same to the Orleans Mining & Milling Co. on the express and implied condition that said company would keep said estate alive by operating and preserving said lease; that said company for over nineteen months wholly failed to perform said express and implied condition, for which reason said estate was lost both to it and defendant Dunfee; and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee was not entitled in such circumstances to retake said estate in his own right as a measure of rescission. [45]

7. The evidence shows without conflict that the Orleans Mining & Milling Co. not only had no means with which to operate said lease or any extension thereof, but had no effectual or *bona fide* intention, willingness or ability to raise means therefor, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that defendant Dunfee, as a large stockholder in said company (and *a fortiori,* as the original owner of said lease), was not entitled in such circumstances to take a new lease of said premises in his own right as a measure of salvage of his investment in said enterprise.

8. The evidence shows without conflict that the Orleans Mining & Milling Co. never by any act or omission of any kind evinced or held a hope or expectancy of a

renewal of said lease, but on the contrary, by all of its conduct or want of conduct showed that it had no such hope or expectancy, and said decree is contrary to the evidence and against law and equity in that it necessarily implies a conclusion of law that in the face of such circumstances a lessee is in effect to be conclusively credited with entertaining such hope or expectancy.

9. The averments of the complaint show, and the evidence shows without conflict, that if plaintiff personally (apart from his character as a stockholder and officer of the Orleans Mining & Milling Co.) held any hope or expectancy of a renewal of said lease, it was wholly based on the terms of the pre-incorporation agreement pleaded in the complaint, and that this hope or expectancy was further based upon an outspoken belief on his part that under said pre-incorporation agreement he was entitled to follow into defendant Dunfee's hands any interest that the latter might ever in any way acquire in the Orleans property, although he, plaintiff, might in the meantime have wholly disregarded his reciprocal obligations under said pre-incorporation contract; moreover, the evidence shows without conflict that plaintiff, in this [46] belief, knowingly and deliberately disregarded his said reciprocal obligations, and knowingly and deliberately laid back with the avowed intention on his part, while himself doing nothing to further the enterprise, to assert a right to the fruits if Dunfee succeeded, and to shirk all responsibility for the risk, time, labor and expense if Dunfee failed; and the decree is contrary to the evidence, and against law and equity, in that it implies a conclusion of law that plaintiff in so acting is not barred by his laches and unclean hands.

10. The evidence shows (*not* without conflict) that Terwilliger knew from the first of Dunfee's independent activities; it shows *without* conflict, and by Terwilliger's

own admission, that he knew of Dunfee's independent activities as early as July, 1921, the date on which Dunfee's sale to the Orleans Hornsilver Mining Co. became public; nevertheless he and his attorneys, without excuse or explanation of any kind pleaded or offered in evidence, delayed the commencement of this suit until March, 1922; and said decree is contrary to the evidence and against law and equity in that it implies a finding of fact and conclusion of law that plaintiff in so delaying is not barred by his gross laches.

11. Said decree is contrary to the evidence in this, that said decree implies a finding, and the court in its formal findings, Par. I, finds, that the "mine showing (in the leased premises) continued to improve so that in March, 1920, the prospect for a large and paying mine was much more favorable than previously, all of which was well known to and understood by said defendant Dunfee," whereas the evidence shows without conflict, and all parties admitted without reserve throughout the trial, that said mine was wholly inactive from October, 1917, until after May 31, 1919; and the evidence shows without conflict that during said period of over nineteen months the mine was falling into decay and dilapidation and its movable machinery was stolen. [47]

12. Said decree is erroneous and contrary to the pleadings and the evidence in this, that the same implies a finding (and the Court found in writing in its written decision) that the leased premises were, until May 31, 1919, self-sustaining, whereas the complaint, Par. VIII, and Par. I of the Court's formal findings, declare, and the evidence shows without conflict, that said premises were not self-sustaining.

13. Said decree is erroneous and contrary to the evidence in this, that it implies a finding, and the court

in its formal findings, Par. I, finds that "said defendant Dunfee, having on or about March, 1920, conceived the intent and purpose of cheating and defrauding said Orleans Mining and Milling Company out of its said leasehold estate and property, and also to cheat and defraud plaintiff and other stockholders similarly situated out of the value of their stock in said corporation, and with the fraudulent intent and purpose to obtain and appropriate to his own use and benefit the said property, on or about June 1, 1920, when said French Company's lease to the Orleans Mining and Milling Company expired, the said defendant, Dunfee, while still a director, president, treasurer and general manager of said Orleans Mining and Milling Company as aforesaid and in exclusive charge of its business and operations, did secretly negotiate for and later, to wit: on June 5, 1920, obtain from said French Company a lease of said mining claims," whereas the evidence shows without conflict that Dunfee's conduct was pursued fairly, without concealment, under a belief and *bona fide* claim of right justified by all of the circumstances, after every duty that he owed to the Orleans Mining and Milling Company had been performed, and at a time when he owed no duty whatever to said company.

14. Said decree is erroneous in that it runs to plaintiff personally instead of to the Orleans Mining and Milling Co., on whose behalf plaintiff, as stockholder, brings this suit. [48]

15. Said decree is erroneous and against equity in that, while it adjudges that defendant Dunfee, in acquiring and selling the lease of January 1, 1921, was acting for the Orleans Mining and Milling Company, it allows him nothing for his risk, time, labor and expense.

16. The Court erred in overruling defendant Dunfee's motion that said cause be dismissed as to him, made at

the commencement of the trial, upon and after the voluntary dismissal of the cause as to defendant Orleans Hornsilver Mining Co., said motion being made upon the ground that the dismissal of said dismissed defendant left no cause of action stated against defendant Dunfee, in this, that plaintiff by his complaint elected to seek to recover the Orleans lease and mine in kind from its purchaser, the Orleans Hornsilver Mining Co., thereby repudiating the sale by Dunfee, while by the dismissal plaintiff sought to abandon said election, reverse his position, ratify Dunfee's sale, and follow the proceeds into his hands; to which ruling defendant Dunfee duly objected and excepted.

16*a*. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence against him statements attributed by witness C. A. Terwilliger to E. Carter Edwards, said to have been made not in Dunfee's presence, and without circumstances binding Dunfee by Edwards' declarations, as follows:

> The WITNESS.— . . . Referring to report of stockholders dated August 1, 1918, I was in Goldfield at that time and had a conversation with Mr. Dunfee or Mr. Edwards or both of them relative to the property and its condition, or what the prospects and future policy of the company would be. We had a conversation the first afternoon we went in to Mr. Edwards; that was, I think, August 1, 1918, or July 31, one of the two days. There were present Mrs. Terwilliger, Mr. Edwards and myself.
>
> Q. And what if anything was said?
>
> Mr. TILDEN.—Is that offered for the purpose of showing any [49] agreement not embodied in that August 1st letter?
>
> Mr. STODDARD.—No, but for the purpose of showing the representations of Mr. Dunfee and Mr.

Edwards to the plaintiff in this action, and his confidence in those statements upon which he relied subsequently.

Mr. TILDEN.—We object to any conversation between this witness and Mr. Edwards. There is no relation of any kind shown to exist between Edwards and Dunfee by which Dunfee would be bound by what Edwards said, and Edwards is not a party to this suit, at least he is not appearing as a party.

Mr. FRENCH.—He is one of the defendants.

Mr. TILDEN.—Well, he is not here defending.

Mr. STODDARD.—Mr. Edwards is one of the defendant directors of the company.

The COURT.—I will allow the testimony to go in, but it will go subject to the objection.

The WITNESS.—Mr. Dunfee was not present at this conversation. . . . Then we discussed the amount of work that had been done in excess of the amount of work that was called for in that lease, and he said that it would apply on the future extensions. . . .

18. The Court erred in admitting in evidence against defendant Dunfee statements attributed by witness Mrs. C. A. Terwilliger to E. Carter Edwards, made not in Dunfee's presence and without circumstances binding Dunfee by Edwards' declarations, over defendant Dunfee's seasonable objection and exception, as follows:

The WITNESS.— . . . The first conversation took place in the office of Mr. Edwards in Goldfield the evening either of the 31st of July, 1918, or the 1st of August, 1918. Mr. Edwards, Mr. Terwilliger and myself were present.

Q. What, if anything, was said referring to the mining operations or to mining properties?

Mr. TILDEN.—Objected to on the ground defendant Dunfee was [50] not present, and no such connection is shown between him and Carter Edwards as would bind him by anything that was said. The same objection that was made previously and Your Honor took the testimony provisionally.

Mr. STODDARD.—Your Honor will recall that Mr. Edwards is one of the defendants in this action, that he is also secretary of the company, and likewise attorney-in-fact for the French Company, so any statements Mr. Edwards may have made relative to the issues of this case, or as to extensions, or any other matters involved in the issues of this case, I think would be material.

The COURT.—As long as Mr. Edwards is a defendant I do not very well see how I can refuse to admit this defendant.

Mr. TILDEN.—He is a mere formal defendant; he is a defendant merely by virtue of his being a director of the company on behalf of which the action is brought. He is made a defendant to comply with the rule of pleading that when a dissenting stockholder begins a suit, he should make defendants those directors to whom he had unsuccessfully appealed to take action on behalf of the corporation in its own name. He is not affected by this action in the slightest degree.

The COURT.—Well, the testimony will be admitted subject to your objection made in behalf of Mr. Dunfee; I don't understand you make it any further?

Mr. TILDEN.—No, that is all.

The COURT.—Proceed.

The WITNESS.— . . . Mr. Edwards stated that the amount of excess work that the Orleans Company had done more than required by the lease would apply on future extensions of the lease. . . .

19. The Court erred, over defendant Dunfee's seasonable objection and exception, in admitting in evidence, through the witness A. I. D'Arcy the facts of the transaction whereby Dunfee sold the lease of January 1, 1921, as follows: [51]

Q. Was the transaction that you had with Mr. Dunfee with reference to this lease?

Mr. TILDEN.—This is objected to on the ground the cause of action relates to a certain lease made in the month of June, 1920; this is not the lease; this is a lease made months afterwards, and there is neither pleading nor proof to connect the lease in question with the lease pleaded.

Mr. STODDARD.—There may be, if the Court please, a variance in this proof, and it may be necessary for us to amend our complaint to conform to the facts; I realize that.

Mr. TILDEN.—Well, that would not help, because there is nothing to bridge the gap between these two transactions. . . . The contract pleaded on calls for extensions or purchases thereto belonging; I will read the whole paragraph so that the meaning of "thereto belonging" will be clear (reads): "In consideration of the party of the first part giving to the party of the second part a fifty per cent interest in and to the Orleans Development Mining and Milling Company, consisting of a lease on the following five claims"—naming the claims—"together with all other extensions or purchases thereto belonging," evidently meaning belonging to said

lease, "said second party agrees to raise," and so forth. There is no proof that this is an extension of the lease mentioned in this contract; in fact, upon its face it purports to be a totally new lease; there is no fact alleged and no fact introduced, why your Honor should disregard the legal aspect of it as a totally new lease, and give it an aspect that it does not bear, to wit, an extension. . . .

The COURT.—I will overrule the objection, and the testimony will go in subject to a motion to strike it out.

Mr. TILDEN.—Will Your Honor allow me an exception at this time, so I will not have to make the motion to strike?

The COURT.—Yes, you may have your exception now. [52]

20. The Court erred in allowing plaintiff, over defendant Dunfee's seasonable objection and exception, to amend his complaint, contrary to the evidence, and thereby materially departing from the cause of action stated in the complaint as filed, by changing part of the wording thereof to read: "Did secretly negotiate for and later, to wit, on June 5, 1920, obtain from said French Company a lease of said mining claims, and on or about January 1, 1921, obtain a modification, renewal and extension of said lease, and thereupon the said Dunfee"—as follows:

Mr. TILDEN.—We object (to the offered amendment) on the ground it is not justified by the showing made by the plaintiff. The only showing in this behalf is from the lips of Mr. Edwards, to the effect that this June 5th lease was surrendered in the fall of 1920, and was thereupon marked cancelled by himself, attorney in fact for the lessor company.

The further objection is that it is a matter of construction as to whether or not anything is a modification, renewal or extension. There certainly is no evidence that lease number three was intended as a modification, renewal or extension, and if upon its face it was such, then it speaks for itself, and becomes a matter of law as to what it is and its character. . . .

The COURT.—I will allow you to make the amendment. Of course it will be subject to the objection. . . . You may take your exception.

21. The Court erred, over defendant Dunfee's seasonable exception, in denying the latter's motion to dismiss made at the close of plaintiff's case, as follows:

Mr. STODDARD.—That is the plaintiff's case in chief.

Mr. TILDEN.—At this time defendant Dunfee moves for a dismissal on the ground that no equity is shown by the complaint, and none is shown by the evidence; and on the ground heretofore raised in the previous part of the trial, namely, that the dismissal [53] of the action as to the D'Arcy Company leaves no cause of action as to anybody. . . .

The COURT.—I will overrule the motion for the present.

Mr. TILDEN.—Your Honor will allow us an exception?

The COURT.—Certainly.

22. The Court erred, over defendant Dunfee's seasonable exception, in sustaining plaintiff's objection to a question propounded to defendant Dunfee seeking to establish the latter's good faith in taking the lease of June 5, 1920, as follows:

Q. When you took this lease of June 5, 1920. what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?

Mr. STODDARD.—Object on the ground that it is incompetent, irrelevant and immaterial as to what he thought about it; it would not be any evidence and would not be binding upon Mr. Terwilliger or those that he represents; it would be a mental process uncommunicated to anybody.

Mr. TILDEN.—He is charged with fraud, and I think we have a right to purge him.

The COURT.—It does not seem to me that it is a very material matter, but I will let you put it in subject to the objection; the fact he thought they had abandoned it would not change the rights of the various parties in any way that I can see.

Mr. TILDEN.—Well, answer it subject to the objection.

A. Yes, I certainly thought they had abandoned it.

23. The Court erred in deciding said cause in favor of plaintiff and against defendant Dunfee.

24. The Court erred in rendering a decree in favor of plaintiff and against defendant Dunfee.

BRIEF OF THE LAW.

I.

The Judgment Is Excessive.

This point is covered by Specification 2, Tr. p. 48.

The judgment orders that "said defendant J. W. Dunfee pay and deliver over to the plaintiffs above named the sum of $40,000.00 * * *." [p. 45.]

The only testimony in the record as to Dunfee's receipts is that of A. I. D'Arcy, the purchaser, as follows:

"The consideration we gave to Mr. Dunfee was $15,000.00 paid on the 18th day of July, 1921. I made that individually. On the 3rd day of January, 1922, there was a payment of $4,028.33 made to Mr. Dunfee. * * * The Orleans Hornsilver Mining Company" (for which D'Arcy was acting) "now owes Mr. Dunfee $20,000.00 on account of this contract. At the present time that is in the form of notes; we have given the company's note for $20,000.00 due June 1, 1923." [p. 228.] The case was tried in December, 1922.

II.

The Judgment Is Erroneous in Running to "Plaintiffs" Instead of to the Corporation, for Whose Use and Benefit the Action Is Prosecuted.

[Spec. 14, Tr. p. 54.]

Direct relief to the stockholders cannot properly be adjudged.

6 Fletch. Enc. Corp., p. 7009.

Judgment should run to corporation, not to plaintiffs.

Elbing v. Nekarda, 132 N. Y. Sup. 309;
Politz v. R. Company, 152 *id.* 803;
Voorhees v. Mason, 254 Ill. 256, 91 N. E. 1056;
Lawrence v. S. P. Co., 180 Fed. 822; appeal dismissed, 228 U. S. 137, 57 L. Ed. 768.

III.

The Judgment Is Erroneous and Inequitable in Not Allowing Dunfee Anything for His Risk, Time, Labor and Expense.

[Spec. 15, Tr. p. 54.]

"While it is true the court might impose upon the appellants the payment of their proportionate share of labor and expenses as a condition of relief, it could not compensate the defendants for the risk assumed by them that their exertions would come to naught."

Steinbeck v. Mg. Co., 152 Fed. 333;
Patterson v. Hewitt, 195 U. S. 309 (319).

IV.

Terwilliger's Election to Recover the Lease Itself Was Final and Irrevocable, and the Court Erred in Allowing Him to Re-elect and Demand the Money and Stock.

[Spec. 1, Tr. p. 47; 16, p. 54; 21, p. 61.]

Terwilliger's earliest election was the written demand caused to be served upon the purchaser, claming the money and stock. [p. 181.] This was done in August, 1921.

He then delayed the commencement of this suit until April of the following year. By that time the mine evidently looked better to him than the proceeds of the sale, and his pleading is an unequivocal repudiation of the sale and demand of the lease and leased premises. Another eight months elapse and the case goes to trial, whereupon Terwilliger returns to his first preference. He does not do this upon the ground that his claim of the lease and premises was the "fatuous choice of a wrong remedy," but upon the ground that his claim of the money and stock could not be supported by proof. His counsel said:

"Now at the time Mr. Cooke drew that complaint, he had information, as stated, that the Hornsilver Mining Company" for whom D'Arcy purchased the lease from Dunfee "took this property knowing all of the facts; we have since been unable to verify that statement by any proof, and for that reason we ask that the Hornsilver Mining Company be dismissed from the suit, because we will fail to connect it up with knowledge, but that leaves the defendant Dunfee in the same position he has always been." [p. 67.]

The foregoing was in answer to Dunfee's motion to dismiss, based upon the ground that he, Dunfee, was a mere nominal party in the action for the recovery of the premises, and that the dismissal of the real party left no cause of action stated as to anybody.

The remedies asserted by Terwilliger are not alternative.

The remedy against the purchaser is not available against Dunfee, because Dunfee has parted with title to the subject-matter.

The remedy against Dunfee is not available against the purchaser, because the purchaser has parted with the money and stock.

In choosing the purchaser as a defendant, Terwilliger waived Dunfee as a defendant.

He also committed himself to a position as to the sale, as to whether he would regard it as a right or a wrong. His first election subjected Dunfee to a claim by the purchaser for a return of the purchase money, on the ground of a failure of consideration. This was a repudiation of Dunfee's act in making the sale. The second election subjected Dunfee to a claim by Terwilliger for the purchase money. This was a ratification of Dunfee's act.

We submit that a party may not subject a defendant first to one plaintiff and then another, and our position is supported by the following authorities:

Fowler v. Bank, 113 N. Y. 450 (453);
Terry v. Munger, 121 N. Y. 161;
Gardner v. Ogden, 22 N. Y. 327;
Seeman v. Bandler, 56 N. Y. S. 210.

No authority holds that matter of estoppel is essential to render an election or a waiver effective. No detriment to or change of position by the opposite party is necessary to support either. The rule as to election and waiver goes to the conscience of the party with respect to the assertion of his rights. If the opposite party suffers detriment his position is of course that much stronger; but then the question of election or waiver is merged in the broader one of estoppel.

16 Cyc. 152, 805;
20 C. J. 4.

But Dunfee has suffered detriment, to wit: his expenditures and labor incurred in being brought in here as a formal and possibly a necessary party in this suit against the purchaser:

Bigelow says:

> "Where a party has given notice of appeal by mistake to a particular court, when the appeal should have been made to another court, and has discovered his mistake *before any step has been taken* by others in consequence, he may at will correct himself; but *only* (at will) upon the footing that *no prejudice* is done to others."
>
> Estoppel, 6th Ed., p. 790.

> "It matters not, if the party acting upon the representation was justified in so doing, *how* (the author's italics) he has changed his position, whether by * * * *the expenditure of money in litigation,* or, it is held, even by being induced to refrain from steps which would otherwise probably have been taken."
>
> *Id.,* p. 696.

Judge Cooley said in a Michigan case:

> "Expenditure in litigation may as reasonably constitute the basis of an estoppel as any other expenditure."
>
> Meister v. Birney, 24 Mich. 435.

See also:

> Myers v. Byars (Ala.), 12 So. 430.

And surely subjecting Dunfee to a liability to the purchaser is a detriment. It is a more onerous liability than that to the corporation, because the value of Dun-

fee's services in opening up the mine and making the sale could not have been set off against it.

Any suggestion that the defense of election should have been pleaded is met by the New York cases above cited, but more emphatically, in the present case, by the fact that the election is established by plaintiff's own pleading. The point was raised as soon as it could be raised, to wit: immediately upon the entry of the order of dismissal as to the purchaser, by motion to dismiss as to Dunfee, and was persisted in whenever opportune throughout the trial.

IV.

No Fiduciary Relation Existed Between Dunfee and the Corporation After the Expiration of the Lease, nor Did He Violate the Relation If It Did Exist.

[Spec. 1, Tr. p. 48; 4, p. 49; 5, p. 50.]

The lease was originally Dunfee's. It was his investment in the enterprise and contribution to the assets of the corporation. He turned it over to the corporation with the implied if not express understanding that the corporation would function and protect it.

If the corporation owed Dunfee no duty, Dunfee owed it no duty. If it owed Dunfee a duty and deliberately violated it, we fail to see how it has any standing in a court of equity, even admitting that Dunfee failed in his duty.

Said the New York Supreme Court:

> "The being president of an insolvent corporation cannot prevent him from doing what that company

has lost all ability to do. Where the company has virtually ceased to exist, and its powers have been taken away, I think the reason and the policy of the rule cease also—because no duty rested upon the agent to run the line for the company after the authority and ability of the company to do so had terminated."

Murray v. Vanderbilt, 39 Barb. 141 (157).

The syllabus of a Texas case follows:

"The fact that H. was director and general manager of a company which held a lease from M. conditioned to become void if a paying quarry was not established on the land in two years did not require him, though knowing M. intended to forfeit the lease for nonperformance of the lease, to inform others interested in the company of said fact, or prevent him, on the forfeiture being declared, from individually taking a new lease free of any interest therein of such others, so long as the failure to develop the quarry was due to no fault of his, but only to the company's inability to finance it."

The court said:

" * * * When Hall has exercised ordinary care in an endeavor to develop and establish the quarry contemplated by the contract, and failed through no fault of his own, but only on account of the company's inability to finance it, and the lease was thereby forfeited, his obligation to the company ceased.

"Because he was director and general manager, the law did not impose upon him the burden to personally undertake to carry out the contract of the company, but only demanded that he exercise

ordinary care, and in good faith attempt to carry out the duties imposed by the trust."

Green v. Hall (Tex.), 228 S. W. 183.

The Missouri Supreme Court said:

"It is true, directors of a corporation occupy a position of trust, and their dealings with the subject-matter of the trust will be watched with a jealous eye by the courts. Here it required $10,000 cash to make the purchase under the stipulation in the lease. The company did not have that amount of money, nor did it have the credit to raise so large a sum. The option was of no value to the company. Though we treat Mr. Butler as still being the president and a director of the corporation, still he certainly had a right to buy the reversion in the property upon which the corporation held the leasehold interest, unless the purchase deprived the corporation of some rights. As the corporation could not avail itself of this option to purchase the property, there can be no valid objection to the purchase of it by him."

Hannery v. Theatre Co. (Mo.), 19 S. W. 82 (84).

In the case at bar not only was the company not financially in a position to take a new lease, but, to the extent that Terwilliger represented it, it was refusing to put itself in such a position except upon a condition with which Dunfee did not have to comply, and to comply with which would have been a fraud upon the other stockholders.

Stockholders failing to interest themselves when money is required, may not complain if an officer buys for his own benefit.

Tevis v. Hammersmith, 84 N. E. 337.

See also:

4 Fletch. Enc. Corp., pp. 3534, 3554;
Stanton v. Gilpin (Wash.), 80 Pac. 290.

V.

Both as a Measure of Rescission and as a Measure of Salvage, Dunfee Had a Right to Take a New Lease in His Own Name.

[Spec. 6 and 7, Tr. p. 50.]

Can there be any manner of doubt that Dunfee could have rescinded the pre-incorporation agreement as against Terwilliger?

The bill of complaint declares that this agreement was made "for the use and benefit of the said Orleans Mining & Milling Co." [p. 4.]

Is there any manner of doubt, therefore, that Dunfee could have rescinded the agreement as to the corporation?

Had he done so, the original lease would have been restored to him.

But the principle is freely recognized that a fiduciary whose investment is being jeopardized may protect himself as Dunfee did in this case. The cases cited under the last caption recognize the principle. This is the underlying principle in Smith v. Lansing, 22 N. Y. 520 (526). See also 4 Fletch. Enc. Corp., p. 3540. In a

case spoken of "leading" certain directors advanced money to rescue the corporation from hopeless embarrassment, taking a mortgage as security. They afterwards bought the property in at execution sale, reorganized the corporation, and put it on its feet. Thereupon stockholders who had stood aloof desired to participate, but they were not permitted to do so.

> Twin Lick Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328.

VI.

There Is No Evidence Whatever That the Corporation Had an Expectancy of a Renewal of Its Lease, But Overwhelming Evidence That It Had No Expectancy.

[Spec. 8 and 9, p. 51.]

It should be observed that, while a fiduciary who handles trust property for his own benefit, has the burden of showing that he acted fairly, he never has the burden of showing that he was a fiduciary or that the property that he handled was trust property.

> "A constructive trust cannot be established by a mere preponderance of the evidence, but must be established by evidence which is clear, definite, unequivocal and satisfactory."
>
> 39 Cyc. 192.

Of course, if Dunfee had a right to retake the leased premises as a measure of rescission or salvage, then he did not take them as a trustee, there was no trust property, and there were no parties to any trust. Having special reference to lease extensions, Pomeroy says:

"The rule applies under every variety of circumstances, provided the rights of the other parties are still subsisting at the time when the renewal lease is obtained."

3 Pom. Eq. Jur., 4th Ed., Sec. 1050.

The expectancy that equity protects must be a "reasonable one," and it is only "under some circumstances" that such expectancy is "recognized as a valuable property right."

Lagarde v. Stone Co. (Ala.), 28 So. 199.

The expiration of the lease negatives the survival of any desire or expectancy.

Green v. Hall (Tex.), 228 S. W. 183.

More than a bare acquirement of the lease must be shown, to wit: a betrayal of trust.

Steinbeck v. Mg. Co., 152 Fed. 333 (338).

The rule ceases to operate when such expectancy no longer exists.

Crittenden etc. Co. v. Cowler, 72 N. Y. S. 701.

"The doctrine seems to be applied in those cases where the court can see that, in enforcing the trust relation * * * it is doing no injury to the interests of the landlord."

Jacksonville v. (Fla.), 43 So. 523.

VII.

The Court Erroneously Found Defendant Dunfee Guilty of Actual Fraud.

[Spec. 13, Tr. p. 53.]

The allegation of actual fraud is contained in paragraph IX of the bill of complaint.

The learned judge in his formal findings found:

"That the cash consideration agreed to be paid by said Orleans Hornsilver Mining Company to said defendant Dunfee for the assignment mentioned in paragraph IX of said complaint, was forty thousand dollars and not fifty thousand dollars as therein alleged; that prior to said assignment the said Orleans Hornsilver Mining Company had no knowledge or notice of the acts charged against the defendant Dunfee by the plaintiff and that, save as above modified, the allegations of paragraph IX of plaintiff's complaint are true." [p. 346.]

True, findings have no place in a suit in equity, but what weight did the court give to this utterly unwarranted finding, in coming to its conclusions?

VIII.

The Court Erred in Not Unconditionally Admitting Evidence Tending to Purge Dunfee of Actual Fraud.

[Spec. 22, Tr. p. 61.]

Dunfee was asked: "When you took this lease of June 5, 1920, what did you think as to whether or not Mr. Terwilliger had abandoned the enterprise?"

The court admitted the answer, "Yes, I certainly thought they had abandoned it," subject to counsel's objection of incompetency, etc. [p. 62.]

We are not aware of the standing of an answer admitted "subject to objection." Dunfee was entitled to an unqualified admission of this answer. That the ruling was prejudicial appears from the court's finding as to actual fraud.

X.

The Court Erred in Admitting in Evidence Against Dunfee Conversations Had by Mr. and Mrs. Terwilliger With Edwards Not in Dunfee's Presence.

[Spec. 16a, Tr. p. 55; 18, p. 56; 12, p. 53.]

The court stated in its opinion, in direct contradiction of the pleadings and all of the evidence, that "the mine was self-sustaining." [p. 35.]

No evidence is cited in support of this statement, for the simple reason that there is no evidence in support of it. It is a remote possibility, however, that the statement is based on the evidence of the Terwilligers to the effect that Edwards said that "the amount of work that had been done in excess of the amount of work that was called for in that lease * * * would apply on the future extensions." [p. 98.]

But for Dunfee to have been bound by this statement he must have authorized it, or been present at its making, or ratified it. These foundations were all lacking, and in view of the court's finding as to actual fraud we submit that the admission of the statement was prejudicial error.

XI.

The Court Erred in Finding That the "Mine Showing Continued to Improve So That in March, 1920, the Prospect for a Large and Paying Mine Was Much More Favorable Than Previously, All of Which Was Well Known to and Understood by Said Defendant, Dunfee," and That "the Mine Was Self-Sustaining."

[Spec. 11, Tr. p. 52; 12, p. 53.]

The first foregoing quotation is from paragraph VIII of the bill of complaint, which by paragraph I of the court's formal findings is found to be "true." [p. 345.]

Both matters quoted are so contrary to the evidence as to suggest that the learned judge did not carefully observe the effect of his blanket findings; but it is certainly possible that it was on the finding that the mine was improving that he found that the mine was self-sustaining, and that on these two findings he found that Dunfee was not justified in taking a new lease in his own name. Moreover, these two findings may account for the court's affirmative finding on the issue of actual fraud.

Surely, therefore, these utterly unjustifiable findings are prejudicially erroneous.

XII.

There Was a Fatal Variance in the Proof. The Court Erred in Permitting an Amendment to Cure the Variance, and in Admitting Evidence Under the Amendment.

[Spec. 3, Tr. p. 48; 19 and 20, pp. 58, 60.]

The cause of action is based on a lease dated June 5, 1920. The amendment permitted a shifting to a lease dated January 21, 1921.

There was no evidence to justify this shift.

XIII.

Terwilliger Was Guilty of Gross, Unconscionable and Unexplained Laches Both Before and After the Lease Expired.

[Spec. 10, Tr. p. 52.]

The books do not afford a parallel of Terwilliger's laches. Indeed, the term laches is not appropriate. Terwilliger deliberately and purposely laid in wait. His denial of notice is nothing short of an insult to intelligence.

> "The defense of want of knowledge on the part of one charged with laches is one easily made, easy to prove by his own oath, and hard to disprove; and hence, the tendency of courts in recent years has been to hold the plaintiff to rigid compliance with the law, which demands not only that he should have been ignorant of the fraud, but that he should have used reasonable diligence to have informed himself of the facts."
>
> Foster v. R. Co., 146 U. S. 99.

He was bound to use available sources of information.

Taylor v. R. Co., 13 Fed. 152.

He must show why he remained in ignorance.

Hardt v. Heidweyer, 152 U. S. 546;

Godden v. Kimmell, 99 U. S. 201, 211.

A general allegation of ignorance is insufficient.

Wood v. Carpenter, 101 U. S. 135.

Failing to pay "any attention to the affairs of the company," is fatal.

Kissler v. Ensley Co., 141 Fed. 130.

His bill should show what prevented his earlier prosecution of his claim.

Badger v. Badger, 69 U. S. 87.

Especially is diligence required when the property is of a fluctuating nature.

Johnston v. Mg. Co., 148 U. S. 360;

Waterman v. Banks, 144 U. S. 394;

4 Pom. Eq. Jur., 4th Ed., Sec. 1444, p. 3427;

Kessler v. Ensley Co., 141 Fed. 130.

The judgment must necessarily be reformed as to amount and so as to run to the Orleans Mining & Milling Co., and so as to provide for Dunfee's reimbursement and compensation, but we respectfully submit that it should be wholly reversed, and the lower court directed to enter judgment for defendant and appellant.

Respectfully submitted,

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JOHN F. KUNZ,

Attorneys for Appellant.

No. 4887

In the United States

Circuit Court of Appeals

For the Ninth Circuit

J. W. DUNFEE,

Appellant,

vs.

C. A. TERWILLIGER, on behalf of himself and all other stockholders of the ORLEANS MINING AND MILLING COMPANY, a corporation, similarly situated,

Appellees.

Appellees' Brief

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Appellees' Brief

STATEMENT

Appellant's Opening brief consists of 66 pages, 50 pages of which are devoted to an effort by appellant to show that the trial court erred in not finding the facts as appellant alleged them to be. The trial court found (Rec. pp. 345-348) the facts to be as alleged by appellee's Complaint with only two quali-

(NOTE—Use of bold-face type by way of emphasis in quotations is, in all cases, unless otherwise stated, our own.)

fications (Rec. p. 346) and neither of those are in anywise involved on this appeal. Twelve of appellant's seventeen specifications of error are to the point that the findings are contrary to the evidence. As we read appellant's Brief it is nowhere asserted or contended that the conclusions of the trial court were not supported by competent evidence, but that the contention now made, in effect, is that the court's finding was contrary to the weight of the evidence.

All the testimony in the case was taken before the court and it therefore had an opportunity to see and hear the witnesses and observe their demeanor. The opinion (Rec. pp. 32-43) of the trial court is an exhaustive and complete review of all of the voluminous testimony.

Under those circumstances, we submit that the finding of the trial court is final upon this appeal.

Taylor v. Nevada Humboldt Tungsten Mines Company et al, (C. C. A. 9th Cir.) 295 Fed., 112-114;
Unkle v. Wills, (C. C. A. 8th Cir.) 281 Fed., 29-36;
Adamson v. Gilliland, 242 U. S. 350; 61 L. Ed. 356-357;
Davis v. Schwartz, 155 U. S. 631; 39 L. Ed. 289-293.

DUNFEE TOOK JUNE 5, 1920, AND JANUARY 1, 1921, LEASES WITH KNOWLEDGE OF UNDER-GROUND CONDITIONS AC-

QUIRED BY HIM WHILE HE WAS ADMITTEDLY ACTING FOR COMPANY, AS TO WHERE GOOD ORE COULD PROBABLY BE FOUND BY FORTY OR FIFTY FEET OF WORK, AND HE ATTEMPTED TO UITILIZE THIS KNOWLEDGE FOR HIS OWN PROFIT. Admittedly Dunfee had actual charge of all min-

ing operations. He was the miner, the man depended upon to get the ore, etc. On August 1, 1918, in a report to stockholders, (Rec. p. 80, Plaintiff's exhibit No. 3) Dunfee strongly advises shut-down until after the war on account of prohibitive costs consequent on war conditions. Dunfee in this report says:

> "The present prospects of the mine **are good** as on the 600 foot level . . . we have uncovered a fine body of ore running from $45 to $50 per ton in the better class of it with a larger amount of ore of $15 to $25 per ton."

Also in Dunfee's report of November 6, 1918, (Rec. p. 133, Defendant's exhibit "B") he says he knew the ore showing on six hundred foot level, because he advises extending drift on six hundred foot level **to the east.**

> "Indications are good for the shoot still to come in . . . found some very rich ore at bottom of winze. . . . The success of the mine in the future will require development to disclose the ore bodies that diligence and perseverance will no doubt discover."

On March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) Dunfee tells Terwilliger "I have looked the state over and there is a better chance on the Orleans than anything I saw. . . . The inducements are better now than ever before."

As we know there had been no work done since the shut-down in the Fall of 1918, and that Dunfee had not been on the ground for nearly a year before writing this letter, we know that whatever showing in the Orleans property he based the statements supra on, they were showings that he knew of at the time of the shut-down. Again, on August 31, 1918, just before the shut-down, (Rec. p. 88, Plaintiff's exhibit No. 6) Dunfee writes Terwilliger, "I am hurrying my work in my **east drift on the 600 level** as it looks like we have ore soon. . . . To-day I have one foot of $22 ore. . . . Do hope it widens." So in his letter of April 4, 1918, (Rec. pp. 91-92, Plaintiff's exhibit No. 8), he refers to ore showings in this same section of the mine, and says, "The future looks much brighter." On September 14, 1918, (Rec. p. 141, Defendant's exhibit "D") Dunfee writes Terwilliger, "I am drifting **east** on some ore. Hope of getting a shipping ore shoot. . . . Things look good for a shipping ore shoot."

Dunfee's Answer (Rec. p. 30) alleges that, after doing seventy feet of lateral work and twenty-four foot of raise **on six hundred level,** he encountered

the good ore which enabled him to sell the lease to D'Arcy for $40,000 cash and 150,000 shares of stock. His oral testimony shows he simply utilized his past knowledge of where to look for the good ore, that in 1918 was indicated as being east or southeast of the six hundred level workings, and in 1920 or 1921 Dunfee found it just as so indicated.

The case infra is in point. Discussing a similar situation, the Court said:

> "For reasons of public policy, founded in a profound knowledge of the human intellect and of the motives that inspire the actions of men, the law peremptorily forbids every one, who, in a fiduciary relation, **has acquired information concerning or interest in the business or property** of his correlate from using that knowledge or interest to prevent the latter from accomplishing the purpose of the relation. If one ignores or violates this prohibition, the law charges the interest or the property which he acquires in this way with a trust for the benefit of the other party to the relation, at the option of the latter, while it denies to the former all commission or compensation for his services. This inexorable principle of law is not based upon, nor conditioned by, the respective interests or powers of the parties to the relation, the times when that relation commences or terminates, or the injury or damage which the betrayal of the confidence given entails. It rests upon a broader foundation, upon that sagacious public policy which, for the purpose of removing all temptation, removes all possibility that a trustee may derive profit from the subject-matter of his trust, so that one whose confidence has been

betrayed may enforce the trust which arises under this rule of law although he has sustained no damage, although the confidential relation has terminated before the trust was betrayed, although he had no legal or equitable interest in the property, and although his correlate who acquired it had no joint interest in or discretionary power over it. The only indispensable elements of a good cause of action to enforce such a trust are the fiduciary relation and the use by one of the parties to it of the knowledge or the interest he acquired through it to prevent the other from accomplishing the purpose of the relation.

And, within the prohibition of this rule of law, every relation in which the duty of fidelity to each other is imposed upon the parties by the established rules of law is a relation of trust and confidence. The relation of trustee and cestui que trust, principal and agent, client and attorney, employer and an employe, who through the employment gains either an interest in or a knowledge of the property or business of his master, are striking and familiar illustrations of the relation."

Trice et al v. Comstock et al, (C. C. A.) 121 Fed. p. 621-622-623.

The language of the Circuit Court of Appeals supra was quoted with approval by the Nevada Supreme Court and applied in a case involving mining property where the question arose under similar conditions as here.

Lind v. Webber, 35 Nev. 623. 50 L. R. A. n. s. 1046, Ann. Cas. 1916A, 1202.

DUNFEE AS DIRECTOR, PRESIDENT, TREASURER AND GENERAL MANAGER WAS FIDUCIARY IN HIGHEST DEGREE.

As squarely supporting the rule supra, see 14a C. J. p. 97, Sec. 1866, and notes.

The rule applies in all its force to officers of a corporation.

14a C. J. p. 99.
7 R. C. L. 456, Sec. 441.
Commonwealth v. McHarg (C. C. A.) 282 Fed. 560-564.
Jackson v. Luedling, 21 Wall. 616. 22 L. Ed. 492.

In the 282 Fed. supra is a discussion of the subject very applicable to the facts of this case.

Though Dunfee as Director, President, etc., was holding over that would not affect rule as to his duty to act with fidelity, etc. Officers of a corporation who hold over must perform their duties with the same degree of fidelity as regularly elected officers.

Kinnard v. Ward (Cal.) 130 P. 1194-1195.

Mr. Pomeroy, in discussing the rule as applying to officers of a corporation and others obtaining for themselves renewal of leases on property used by the corporation, and holding that such lease enures

to the benefit of the company and is regarded as a continuation of or as grafted on the old lease, continues as follows:

"This rule applies under every variety of circumstances, provided the rights of the other partners are still subsisting at the time when the renewal lease is obtained. It operates with equal force whether the renewal lease was to begin during the continuance of the firm or after its termination; whether the partnership was for an undetermined period, or was to end at a specified time, and the renewal lease was not to take effect until the expiration of that prescribed time; whether the landlord would or **would not have** by contract, custom, or courtesy, to a renewal of the original lease from the lessor; and even whether the landlod would or **would not have granted a new lease** to the other partners or to the firm. All these facts are wholly immaterial to the application of the doctrine, for its operation does not in the slightest degree depend upon the terms and provisions of the original lease, nor upon the attitude of the landlord. The doctrine is not confined to partners; it extends in all its breadth and with all its effects to trustees, guardians, and all other persons clothed with a fiduciary character, who are in possession of premises as tenants on behalf of their beneficiaries, or who are in possession as tenants of premises in which their beneficiaries are interested. As this rule results from the relation of trust and confidence existing between the partners or other persons interested, it might be regarded as an outgrowth of the doctrine formulated in the preceding paragraph. It is more directly, however, a particular application of a broad principle of equity, extending to all

actual and quasi trustees, that a trustee, or person clothed with a fiduciary character, shall not be permitted to use his position or functions so as to obtain for himself any advantage or profit inconsistent with his supreme duty to his beneficiary."

3rd Pomeroy Eq. Jur., 4th Ed., Sec. 1050.

DUNFEE AND EDWARDS AS OWNERS OF STOCK CONTROL WERE TRUSTEES AND FIDUCIARIES OF PLAINTIFF AND OTHER MINORITY STOCKHOLDERS.

Admittedly Dunfee owned 300,000 shares and Edwards had 1,000 shares out of a total issue of 600,202 shares outstanding. Terwilliger had 267,000 shares and his Imperial Valley associates had 32,000 shares—a total of 299,000 shares. The complaint charges Dunfee and Edwards jointly with the acts complained of, but as Dunfee seems to have obtained for himself the fruits of the transaction complained of, plaintiff as a minority stockholder seeks to hold him as trustee.

"The rule of corporation law and of equity invoked is well settled and has been often pleaded. The majority has the right to control; but when it does so it occupies a fiduciary relation toward the minority; as much so as the corporation itself or its officers and directors."

Southern Pacific Co. v. Bogart, 250 U. S. 483. 63 L. Ed. 1099-1106.

See also Glengary Mining Co. v. Boehmer (Colo.) 62 P. 839.

Dunfee, as Director, President, Treasurer and General Manager, was trustee and prohibited from so dealing with property of Company as to place himself in an antagonistic position to other stockholders.

As squarely supporting the rule supra as applied to facts in principle identical with those involved in the case at bar, we cite:

Commonwealth v. McHarg (C. C. A.) 282 Fed. 560-563.
McCourt v. Singers-Biggar (C. C. A.) 145 Fed. 103. 7 Ann. Cas. 287.
Davis v. Hamlin (Ill.) 48 A. R. 541.

The two last cited cases supra involved attempt to take renewal of lease.

See also 7 R. C. L. p. 483, Sec. 464.
Morgan v. King (Colo.) 63 P. 416-421.
Glengary Mining Co. v. Boehmer (Colo.) 62 P. 839.

NON-OPERATING CORPORATION OR IN FAILING CONDITION — OFFICER OF, EQUALLY PRECLUDED FROM TAKING RENEWAL OF LEASE TO HIMSELF.

Dunfee's Answer (Rec. p. 22) avers that on and

after May 30, 1919, the Company was without assets or business and was to all intents and purposes dead. That it was without "assets" is unquestionably untrue, because we know from Dunfee's own report to stockholders (Rec. p. 80, Plaintiff's exhibit No. 3) the French Company had directed Edwards to extend the lease until June 1, 1920, and we know from Dunfee and his letters to Terwilliger that Dunfee had discovered indications to the east of the six hundred foot level workings that satisfied him that there was a rich shoot of ore there. We know from Edwards' letter (Rec. pp. 328-330-332, Plaintiff's exhibit No. 18) that the lease had in fact been extended by him to June 1, 1920, just as the French Company had directed him. So we know the Company had a valuable asset, one which a few years earlier plaintiff had paid $8,000 for a one-half interest in, and under which in less than two years' time the Company had taken out about $60,000 or $75,000 in ore, and under which Dunfee had previously taken out $85,000. Dunfee was confident (Rec. p. 133, Defendant's exhibit "B") of finding rich ore by drifting easterly on six hundred foot level; he was never discouraged, for on September 14, 1918, just before shut-down, (Rec. p. 141, Defendant's exhibit "D") he writes Terwilliger, "If we close down you and I will try outline a plan of action." On August 1, 1918, (Rec. p. 80, Plaintiff's exhibit No. 3), referring to proposed shut-down, Dunfee writes, "The present prospects of the mine

are good. . . . We have uncovered a fine body of ore running from $45 to $50 per ton in the better class of it with a larger amount ore of $15 to $25 per ton. . . . The deeper developments have been very encouraging."

On March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) Dunfee writes Terwilliger, "I have looked the state over and there is a better chance on the Orleans than anything I saw. . . . The inducement are better now than ever before."

A lease on such a property, equipped with hoist, blacksmith shop, etc., having at least a year to run, is a very substantial asset. But this is not all. The lessee has always an expectancy, hope or chance of obtaining a renewal, extension, etc., and this of itself is recognized by all the authorities as being a property right, and in this case we know from Edwards, the duly authorized agent and attorney-in-fact of the lessor company, from his letter (Rec. p. 330, Plaintiff's exhibit No. 18) that he would have granted the extension or renewal. The property was shut down in the Fall of 1918 because of extraordinary war conditions, and not because of any failure of the mine. Everybody, Dunfee included, fully intended to resume after war conditions eased up. The Company owed no debts, for Dunfee's report of November 6, 1918, (Rec. p. 132, Defendant's exhibit "B") says, "The mine is entirely free from

debt and no trouble can come from creditors as there are none." So also in Dunfee's report of August 1, 1918, re then contemplated shut-down (Rec. p. 79 Plaintiff's exhibit No. 3), Dunfee states, "We have succeeded at all times in paying the labor and running expenses of the company and are in good shape." When the property was shut down we know the mine was in good condition, and that the shut-down was due solely to excessive cost on account of war condition, and probably also in part to the shutting down of the mill of the Silver Corporation, where Dunfee was milling his ore, because on September 14, 1918, Dunfee writes Terwilliger (Rec. p. 141, Defendant's exhibit "D", "I am drifting east on some ore. Hope to get a shiping ore shoot. . . . Things look good for a shiping shoot."

The foregoing completely disproves Dunfee's allegation that Company had no assets on and after May 30, 1919. But for purpose of argument only, conceding that there was a rule that an officer of a moribund failing corporation may take renewal of lease on company property for himself, there is here no basis for application of such rule because of the facts supra. But no such rule exists in any event. The chance, hope or expectancy of lease renewal is itself a property right, and when corporation is failing, the duty of its officers to conserve its assets for creditors and stockholders, instead of indulging in an unseemly scramble to appropriate

it for their own benefit, should in equity be all the stronger.

In the case infra, the Pike's Peak Co., being in the business of running an amusement resort, became involved in financial difficulties and was adjudicated a bankrupt. It had a lease which was practically its sole property. Defendant Pfuntner was a large stockholder, a director and general manager. A fire occurred which destroyed the resort. While Pfuntner was an officer and manager of the Company, he obtained from the lessor a lease of the property to take effect after the lease to the Company would expire. He did not notify any other officer of the Company of his intention so to do, and none of them were aware of his purpose. After they learned of his taking the renewal, the Directors demanded the renewal for the Company, and on refusal of Pfuntner suit was brought. The Court applied the rule holding that because of the fiduciary relations existing Pfuntner was held to the utmost fairness and honesty, that while the Company had no enforceable right to renewal of the lease yet there was an expectancy recognized by law as a valuable asset belonging to the Company, and that the law would not permit an officer to take it from the Company to whom he owes the duty of protection, and that he could not take it except with full knowledge and consent of his principal. Regarding the contention that the Company was in failing cir-

cumstances, without assets, etc., the Court said:

> "It is no defense for defendant Pfuntner that the Company for which he was acting was involved in financial difficulties and was adjudicated a bankrupt. This expectancy belonged not only to the tenants, but to those to whom the lease might be assigned. The original lessee and his assignees have continued to pay the rent, and the complainant, as we infer from the record, has rebuilt the structure at considerable expense. Pfuntner did not obtain this lease with the knowledge or consent of the party for which he was the agent, manager and a director. It follows that he holds the lease in trust for complainant."

Pike's Peak Co. v. Pfuntner (Mich.) 123 N. W. 17-21.
To same effect, 4 Fletcher Corp., Sec. 2285.
3 Cook Corp., 7th Ed., Sec. 660, note.
Idem, Sec. 653 and note 1.

The Hannerty case cited by counsel (Op. Br. p. 58) involved a very different situation from that in this case or in the Pike's Peak case supra and we think is not in point.

That the financial condition of the lessee company can make absolutely no difference as to application of rule, we cite the fact that the Courts go so far as to hold that **refusal** of owner to renew lease to original lessee does not affect application of rule that officer of corporation lessee cannot obtain renewal for himself.

McCourt v. Singers-Biggar (C. C. A.) 7 Ann. Cas. 296 note 298.

The reasonable expectancy of lessee in obtaining a renewal or extension of a lease is a property right, and a fiduciary or officer of corporation lessee may not take renewal to himself.

McCourt v. Singers-Biggar supra.
18th A. & E. E., 2nd Ed., p. 696.
Davis v. Hamlin (Ill.) 48 A. R. 541-544.
Robinson v. Jewett (N. Y.) 22 N. E. 224-226-227.

Under rule prohibiting officers of corporation and persons similarly situated from taking renewals of lease held by corporation, in their own name, it is immaterial that the lease had expired at the time the new lease was taken.

Edwards v. Lewis, 3 Atk. 538 (Old English case).
Hausuer v. Dahlmann, 45 N. Y. S. 1088-1090. Aff. 57 N. E. 1111.
Mitchell v. Reed (N. Y.), 19 A. R. 252 (Citing and quoting from English cases to point, see p. 257.)

And when partnership has been dissolved and one of former partners takes renewal of lease in his own name equity will hold it for the firm, as right or hope of renewal is deemed to be a graft upon or attached to original lease.

Johnson's Appeal, (Pa.) 2 A. S. R. 539-541.

DeBartleman v. Bessemer, (Ala.) 37 S. 511-514.

Dunfee as Director, President, General Manager, etc., in charge of operations, was under a duty to protect and conserve the Company's property, and this necessarily included obtaining or attempting to obtain an extension of the lease or renewal of it for the Company, and being under such duty he could not purchase or acquire such property for himself.

4 Fletcher Corp., Sec. 2285 and note 94.
3 Pom. Eq. Jur., 4th Ed., Sec. 1050.
Wheeler v. Abilene etc. Co. (C. C. A.) 159 Fed. 391-393-394.
Zeckendorf v. Steinfield (Ariz.) 100 P. 784-790.

Where managing director obtains a renewal of the company's lease on the premises used in the business, for himself, his failure to procure such renewal for the company when he could have done so at same rental, is a breach of duty.

4 Fletcher Corp., Sec. 2285 and n. 96.

Dunfee, being a fiduciary when new lease or leases were taken, his possession is deemed possession of the Orleans Mining & Milling Company.

Hoffman v. Reichart (Ill.) 37 A. S. R. 219-220
14a C. J. 121, Sec. 1889 and note.

LACHES IS FOUNDED ON INEXCUSABLE DELAY OF ASSERTION OF RIGHTS AS ONE ESSENTIAL ELEMENT.

Los Angeles to confer with me regarding the matter

Dunfee's defense of laches in plaintiff's assertion of rights cannot be based on **mere delay alone,** but it must be delay with **knowledge or notice of the facts** sufficient to cause an ordinarily prudent man to act. This as applied here means that before such defense can avail, it must appear that Terwilliger knew or at least had some sort of notice that Dunfee had not only taken the June 5, 1920, and the January 1, 1921, leases in his own name, **but was claiming adversely;** that he had repudiated the trust which equitably inhered in his office and which in absence of notice of facts to contrary, Terwilliger had right to rely on even if notice of mere fact of leases being taken had been brought home to Terwilliger. This must be so, because under the peculiar situation here the French Company seemed to have dealt with Dunfee. The lease of June 19, 1915, was in Dunfee's name, and it was continued in his name by extensions until June 1, 1920. The Company, while the equitable owner of the lease, does not seem to have had it formally assigned in writing or technically recognized by the French Company as the lessee. According to Dunfee's own letters, etc., they looked exclusively to Dunfee and even made it a proviso of renewing the lease that Dunfee be the manager of the property. Hence even if Terwilliger had known that Dunfee had obtained the June 5, 1920, and January 1, 1921, leases in his own name, this of itself would have been no notice to Terwilliger that Dunfee was claiming hostilely, as Terwilliger could and doubt-

less would have assumed, and rightfully so, that Dunfee was simply continuing the same method as had been employed in regard to the earlier extensions, and that the leases being in Dunfee's name meant nothing as between Dunfee and the Orleans Company so far as indicating adverse claim or repudiation of trust by Dunfee.

Therefore we say that before laches can be assigned, it was imperatively incumbent upon Dunfee to show not only that Terwilliger knew of his having taken these leases in his own name, but also knew that Dunfee intended to hold the leases for his **own benefit to the exclusion of the Company's rights.** But Dunfee, so far from not alleging notice to or knowledge of Terwilliger re Dunfee taking June5, 1920, and January 1, 1921, leases, gave no evidence on trial to the effect that Terwilliger had any notice or knowledge of such leases being taken, and still more fatal to Dunfee's case, he gave no evidence that Terwilliger knew anything whatsoever as to Dunfee's hostile attitude, adverse claim, repudiation of trust, etc. In addition to this, there is absolutely no allegation and no showing in evidence that Dunfee relied on or was misled by any non-action on the part of Terwilliger because Dunfee would first have to show notice or knowledge followed by non-action. That Dunfee did not know of Terwilliger's alleged talk with Mrs. Dunfee in the Summer of 1920 about the alleged Dunfee-McMahon

lease sale, is shown by Dunfee's own allegation (Rec. p. 28) where he says, referring to Terwilliger's letter of May 2, 1920:

> "That neither this defendant nor the Orleans Company ever thereafter heard from or of plaintiff or any of his said associates until after the consummation of the deal sought to be set aside in this action."

But even if Mrs. Dunfee's statement of her alleged talk with Terwilleger be all true, and even if she had in fact promptly communicated same to Dunfee, it would in no wise affect the case, because there was absolutely nothing in what Mrs. Dunfee claims she told Terwilliger that would put him on notice that Dunfee had even taken a new lease or that he **was claiming it for himself.**

To completely dispose of this laches defense, we call attention to fact that Dunfee when on witness stand was asked what it was that Terwilliger said or did that led him (Dunfee) to think Terwilliger had abandoned the business, and Dunfee stated it was Terwilliger's letter of May 2, 1920, (Rec. pp. 209-210, Plaintiff's exhibit No. 12). But this letter, so far from indicating any attitude of abandonment, is squarely to the contrary, because Terwilliger after explaining reasons for delay in answering Dunfee's letter of March 26, 1920, (Rec. p. 84, Plaintiff's exhibit No. 4) says: "When will you be in

of the Orleans property. I would not attempt to do any business through the mail, as I consider it would be time wasted. I expect to be here from now on."

The case infra was a joint adventure in mines, and laches was principal defense. The Court found appellant's alleged laches—i.e., his failure to furnish money, was due to his **want of notice or knowledge** that any money was required, and ruled against the defense.

Miller v. Walser (Nev.), 181 P. 437-444.

"It is an essential element of laches that the party charged with it should have had **knowledge** or the means of knowledge of the facts creating his right or cause of action—mere lapse of time, however long continued, will not bar the defrauded party's right to relief while he remains **ignorant of the fraud** and has no knowledge of facts which would lead a reasonably prudent man to discovery of it."

21 C. J. 244, Sec. 242 and n. 8 and 9 and cases cited.

"But a person is not required to exercise extraordinary diligence. If there is nothing to excite suspicion and no apparent reason for making investigation, a person is not negligent in failing to make inquiry. To charge a person with implied knowledge, the known facts must point with some directness toward the unknown— Want of knowledge may be accounted for by plaintiff's infancy —or absence from the community, and the confidential relationship between the parties also may be an excuse."

21 C. J. 248, Sec. 244.

See also idem p. 250, Sec. 249.

"Laches is a defense only when the stockholder, **with a full knowledge of the facts,** has delayed an unreasonable length of time in bringing his action. These two elements, **knowledge** and **delay,** are the essential elements of the defense. Until the stockholder has **full and complete knowledge of all the essential facts** which would be likely to induce him to institute the action, the beginning of the time from which laches will run cannot be said to commence."

3 Cook Corp., Sec. 731.

Laches does not commence to run until the stockholder has discovered the facts.

Brinkerhoff v. Roosevelt (C. C. A.) 143 Fed. 478-480.

A delay of four years may be excused by the fact that the complaining stockholder did not know the facts until three months before he instituted suit.

Kessler v. Ensley Co. (C. C.) 129 Fed., 397-417 et sec.

The lapse of time without knowledge or means of knowledge is no bar.

Fox v. Robbins (Tex.) 62 S. W. 815.

"Constructive notice, however, does not apply to a case of fraud, and constructive notice cannot relieve the party from responsibility for a fraud. It is not incumbent on the stockholder to keep himself informed as to the various acts of the corporation. He is not chargeable with knowledge

merely because he might have ascertained the facts by an examination of the corporate books. Moreover, it is a well established rule that lapse of time alone cannot support the defense of laches. There must be both knowledge and delay."

3. Cook Corp., Sec. 731.

The foregoing disposes of Dunfee's contention (Rec. p. 26) that the fact of cancellation of lease was of record in the office of the Company in Goldfield, in the possession of defendant Edwards as Secretary, and his contention (Op Br. pp. 65-66) that Terwilliger was in some way under a duty to keep himself informed, and because he did not do so he is to be charged with constructive notice of what he could have learned had he gone to Goldfiefild and examined the records.

Further, in support of our contention, we cite:

Lind v. Webber, 36 Nev. 623. 50 L. R. A. n. s. 1046, Ann. Cas. 1916A, 1202.

"In the first place it may be stated that a person cannot be said to have been guilty of laches prior to the establishment of his right to sue. And on the same grounds the lapse of time may be excused where the plaintiff was unable, from the obscurity of the transaction, to obtain full information in regard to his rights—. In considering the question of laches, courts manifest the utmost leniency where it appears that the delay is due to the intimate personal relations subsisting between the parties and the high degree of confidence reposed by one in another."

10 R. C. L. 402, Sec. 149.

"It is therefore of the essence of laches that the

party whose delay is in question shall have been blameable therefor in the contemplation of equity, and accordingly it must appear that he had knowledge, actual or imputable, of the facts, which should have prompted a choice either diligently to seek equitable relief or thereafter to be content with such remedies as a court of law might afford; . . . Laches cannot be imputed to one who is innocently ignorant of his rights. . . . However, mere suspicions or random statements heard in public do not necessarily constitute notice; although, after a person's suspicions are reasonably aroused, it is his duty to investigate at once."

10 R. C. L. 405, Sec. 153.

"Acquiesence of plaintiff cannot be inferred from mere non-action where there was no occasion for an earlier assertion of his right."

21 C. J. 229.

So in reference to expenditures made by party asserting the defense, it will not avail where plaintiff had no knowledge that his rights were being invaded.

21 C. J. 232, Sec. 226 and n. 92.

DEFENSE OF ELECTION URGED ON TRIAL BY DUNFEE NOT AVAILABLE TO HIM.

Because the plaintiff joined the Orleans Hornsilver Company as defendant with Dunfee, and claimed relief against that Company which is urged (Op. Br. pp. 52-56) to be inconsistent with the relief claimed against Dunfee, the latter now claims plaintiff made an "election" of remedies and cannot recover herein on theory of Dunfee being a trustee; the precise point being, as we understand it, that the suit originally was to recover the property in specie, whereas by dismissing as to the Orleans

Hornsilver Company, we are now asking that Dunfee be adjudged a trustee of the **proceeds of such property.**

It is true that we alleged the Orleans Hornsilver Company took with notice, etc., and that we asked that its claim be decreed accordingly, but it is also true that in the prayer as a sort of alternative, we ask that it be decreed:

> "That in respect of all things done by said defendant Dunfee in the negotiating for or obtaining said lease, he acted as a trustee and for the use and benefit of said corporation."

Because Terwilliger prayed for certain relief against the Orleans Hornsilver Company, which relief is asserted by Dunfee to be inconsistent with the relief prayed for against Dunfee, it is said Terwilliger made an election to claim as against the Orleans Hornsilver Company and not as against Dunfee. But from this it would logically follow that the relief prayed for against Dunfee must be equally inconsistent with the relief prayed for against the Orleans Hornsilver Company, and it would then further follow that the Orleans Hornsilver Company could have claimed Terwilliger elected by asking that Dunfee be declared a trustee, and if such plea were sustained and Dunfee left as sole defendant, Dunfee could then say—as he in fact now does—

that because we prayed for inconsistent relief against the Orleans Hornsilver Company, we thereby made an election and are estopped from claiming against him, and the result would be that both defendants would be wholly released and plaintiff's cause of action, however meritorious otherwise, would be dismissed.

We say an election cannot be **predicted upon the prayer** but only upon the **facts relied on** for relief or as basis for recovery. The same **facts** remain in complaint now as when first filed, so far as Dunfee is concerned. There has been no shifting as to the facts constituting plaintiff's cause of action against Dunfee. But necessarily we must abandon the **prayer** insofar as the Orleans Hornsilver Company is concerned, because the allegations of fact as against the Orleans Hornsilver Company were not supported in evidence.

In case infra plaintiffs in their first complaint charged a conspiracy and asked for judgment for the contract price of certain goods, and prayed defendants be enjoined from transferring the property involved. Afterwards plaintiffs amended by praying judgment for damages on **substantially same facts.** The Trial Court apparently concluded that plaintiffs had by their first complaint elected to recognize contract as valid, and refused to allow

amendment asking for damages, but this was reversed, the Supreme Court saying:

"It seems to us that, if the statements in said second amended petition were all true, the plaintiffs would be entitled to some relief, and that they were not entitled to the specific relief prayed for would not preclude them from introducing any evidence, or from receiving such relief as the evidence might show that they were entitled to . . . these two positions are not so inconsistent as, under the authorities hereinbefore cited, the election of one precludes the right to pursue the other. . . . However strongly a pleader may be bound, and however much he may be estopped, by the averments of **facts in the body** of his pleadings, it is doubtful whether he is bound or estopped by his **prayer for relief.** He is supposed to know the **facts** upon which he predicates his action, and to state them as he understands them; but the relief to which he is entitled on the facts related is a question for the court, and over which he has no control."

King et al v. Gleason (Kans.) 51 P. 301-302.

"The **prayer** for relief in a petition is not such an election as will preclude plaintiff from filing an amended petition urging substantially the same facts and asking a different relief."

20 C. J. 35.

"There is nothing in the intricacy of equity pleading that prevents the plaintiff from obtaining the relief under the general prayer, to which he may be entitled upon the facts plainly stated in the bill. There is no reason for denying his right to relief, if the plaintiff is otherwise entitled to it, simply because it is asked under the prayer for general relief, and upon a somewhat different theory from that which is advanced under one of the special prayers."

Lockhart v. Leeds, 195 U. S. 427-436; 49 L. ed. 263-269.

In the case infra the United States sued in equity to set aside a patent for fraud, alleging that defendant Debell had fraudulently induced the Secretary of the Interior to issue a patent to an Indian, and that Debell had then bought the land of the Indian for $2,000 when it was worth much more. Debell sold the land to one Butterfield, who was made a defendant with Debell. The prayer was that the patent and deeds be set aside, or if Butterfield was an innocent purchaser then that Debell be decreed to hold consideration received by him in trust. Butterfield was dismissed from the case and Debell urged that because the relief sought against him, viz: that he be decreed a trustee of proceeds of sale to Butterfield, was inconsistent with the relief sought as against Butterfield, viz: a cancellation of his deed, that the Government was barred. But the court ruled against the defense, saying:

"that where the proof sustains the cause of action in equity, but the defendant has by his course of conduct rendered the appropriate relief first sought ineffective, the chancellor may require him to make compensation for his prevention of that relief. **Where the primary relief sought is the restoration of property** and the defendant has placed it beyond his and the court's reach, the court may require him to pay the value of the property, or the proceeds he received from

it, because the right to this relief inheres in and grows out of the equitable cause of action which the plaintiff has established. Moreover, the right to recover the proceeds springs from the immemorial jurisdiction of courts of equity to enforce trusts. One who by fraud or wrong acquires the property of another thereby becomes a trustee de son tort of that property, and holds it in trust for the owner. If he sells and conveys it the owner may successfully pursue him in equity as trustee for the property, or for the proceeds of it. If, therefore, the proof established the plaintiff's cause of action in equity against the defendant for the restoration of the land, he cannot escape accounting for the proceeds he obtained for the property, or the value thereof, on the ground that he placed the land itself beyond the reach of the court."

United States v. Debell, et al, (C. C. A.) 227 F. 760-764.

We believe the case supra to be conclusive against Dunfee's defense of "election" in the instant case, because the facts and the prayer for relief in both cases are identical, except perhaps that there is a slight difference in the form of the prayer. We prayed for two forms of relief inconsistent with each other. So did the Government in the Debell case. We did not in so many words make express statement or ask for relief against Dunfee as an "alternative" in event we failed as against the Orleans Hornsilver Co. The Government in the Debell case did not ask for relief against Debell as an

"alternative" in event it failed as against Butterfield.

The case infra is very much in point, and in some respects it goes farther on point here considered than the case at bar. The United States sued in equity to cancel a patent to land issued to one Robertson, who later transferred to Frick. Robertson died. The plaintiff alleged the patent to Robertson had been obtained by fraud, in that knowingly false statements were made that there were no minerals on the land, and it was further alleged that the Frick deed from Robertson was taken with knowledge of the fraud. The relief specially prayed for was that the patent and deed be held void and the land returned to plaintiff as part of public domain, and then followed a general prayer for "such other or further relief as may accord with principles of equity." On the trial it developed for the first time that Frick had deeded the land to the California Door Company, who was an innocent purchaser, and thereupon Frick contended that the plaintiff having elected to claim cancellation of patent as its specific relief, was barred from pursuing him in equity as a trustee for the value of the property. The Court said:

> "The case falls, I think, within the well-recognized exception that, where the facts are such as primarily to give equity jurisdiction of the controversy, and that jurisdiction has obtained, if an

act of the party charged has made the application of the specific remedy sought impossible or impracticable, the court **will retain jurisdiction** to award money damages or **give such other relief as may be just in the premises.**

Such a case was Cooper v. United States, 220 Fed. 867, 136 C. C. A. 497 (decided by the Circuit Court of Appeals of this circuit), which in the circumstances is not to be readily distinguished from the present case. There the transfer of land was made after the suit brought, but before service, and the bill was amended to bring in the grantee as a party. It appearing at the trial, however, that the latter was a bona fide purchaser for value, and the fraud being established, the lower court awarded a decree against the party charged for the value of the land in damages; and the appellate court held that this relief, being within the issues, was properly awarded under the general prayer.

Another similar case is that of Johnson v. Carter, 143 Iowa, 100, 120 N. W. 322, where the court, in response to a similar objection, say:

'It would be a strange perversion of the spirit which pervades all rules of equity if, when a party who has been defrauded of his title to land brings the person who defrauded him into a court of equity, upon a demand for rescission of the conveyance, he can divest the court of jurisdiction by showing that he has conveyed the title to an innocent purchaser, and thus compel the injured party to resort to another forum for the recovery of damages.' "

United States v. Frick, et al (D. C.), 244 F. 574-579.

The above case was affirmed on appeal—Frick v. United States (C. C. A.) 255 F. 612.

Counsel says (Op. Br. p. 53) the remedies we

sought against Orleans Hornsilver Mining Co. and against Dunfee are not "alternative remedies." "Remedy" and "relief" are not one and the same thing. A "remedy" is usually a form of action, such as a case of conversion, replevin, damages, or the like. "Relief" is that which equity affords as compensation or reparation for an injury or wrong after the injured party has invoked a "remedy" by bringing an action in some form entitling him to "relief." "Remedy" is the vehicle upon which the litigant rides, and "relief" is the objective. But reverting to counsel's contention, we believe he is mistaken, for the reason that we had at least two, if not three, "alternatives"—viz: we could have sued the Orleans Hornsilver Mining Co. for a restoration of the property, or we could have ratified the sale and sued that Company for the value of the property, or we could have elected to treat sale to that Company as valid and sued Dunfee for proceeds, or as a still further alternative we could sue both the Orleans Hornsilver Mining Co. and Dunfee in one action and pray for relief in the alternative, just as we did do.

At page 54 Op. Br. counsel refers to some New York cases, which we will consider.

Fowler v. Bank, 113 N. Y. 450, 21 N. E. 172, 4 L. R. A. 145, 10 A. S. R. 479, was an action at law where one White deposited $805.93 with the bank,

in trust for his wife, and obtained a passbook. White died shortly thereafter—on November 13, 1882—and one Flynn was appointed executor. The wife died December 18, 1882, and plaintiff Fowler was appointed executor of her will. On January 25, 1883, Fowler exhibited his letters and demanded payment of bank, and the bank told him to produce the pass-book. Flynn, the executor of the husband's will, had the pass-book and on January 29, 1883, he presented it with proof of his appointment as executor, and demanded and received payment of the $805.93. Thereafter Fowler demanded payment and was refused by bank on the ground it had paid the deposit to Flynn, who had the pass-book. Thereafter Fowler as executor sued Flynn for the money and obtained judgment, but being unable to collect he sued bank for making wrongful payment to Flynn after notice, etc., and the bank pleaded election by the suit and judgment against Flynn. The only excuse for bringing the second suit was that Fowler was unable to collect the judgment against Flynn. The court sustained the defense of election, and said:

> "If the money had been absolutely the money of the plaintiff (Fowler), left on special deposit with the bank, then he could have pursued the money **wherever he could trace it without losing his remedy against the bank.** In such a case the plaintiff would not be barred of his right of recovery against the bank until he had either recovered his money or the value of the same. All his

remedies would be consistent, being based upon the theory of a wrongful disposition of his property. So, too, where a trustee, in breach of his trust, disposes of the trust property, the beneficiary of the trust may pursue it or its proceeds **wherever he can trace them,** so far as the law will permit him to do so, **without relieving the trustee.** All his remedies in such a case are consistent and based upon the same theory, to-wit: **a breach of trust.**"

The foregoing excerpt is squarely in point in support of plaintiff's position here, because Dunfee is charged as a trustee who disposed of trust property, and plaintiff as a beneficiary of the trust was attempting to pursue it after tracing it to the Orleans Hornsilver Mining Company, and the authority supra squarely holds that such action in such case does not relieve Dunfee, the trustee, because the entire proceedings are based upon the same theory, to-wit: a breach of trust.

Terry v. Munger, 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 A. S. R. 803, cited by counsel, was also an **action at law.** Terry first sued Kipp and Munger in conversion for value of certain personal property. Thereafter he sued Munger alone for **damages** for converting the property, and the court held that by the first action plaintiff had ratified the sale to Kipp and Munger and he could not thereafter sue Munger for damages based on same facts. We do not dispute the correctness of such decisions, but

deny their application here.

Counsel also cites Gardner v. Ogden, 22 N. Y. 327, 78 A. D. 192, but that case instead of supporting Dunfee's contention here supports plaintiff's. Plaintiff Gardner, who resided in New York, owned some lots in Chicago and employed Ogden, Jones & Co., real estate agents in Chicago, to manage the property. The defendant Henry Smith and one Frank Hathaway were clerks in the Ogden Jones & Co. office. Smith and Hathaway by using the firm's letterheads and firm name, etc., fraudulently induced Gardner to sell the Chicago property to "Mr. Henry Smith" for $7500.00. The property was worth substantially more than $7500.00, and later plaintiff upon learning this sued Ogden and Smith, charging Ogden with fraud in selling the property for less than its value, and also claimed that Ogden was interested in the purchase. Plaintiff asked that the deed to Smith be set aside and that Smith be compelled to re-convey, or that Smith and Ogden pay the highest price which the land had attained. Plaintiff had judgment and both defendants appealed to appellate division of Supreme Court, which court reversed the judgment and ordered a new trial, and plaintiff Gardner then appealed from such order to the Court of Appeals, and that court held that the proof failed to show that Ogden was a party to the fraud or interested in the purchase, and affirmed the

judgment dismissing him but reversed the judgment of the intermediate Appellate Court granting a new trial as to Smith, and affirmed the judgment of the trial court as to defendant Smith, with costs, etc.

It will be noted in the case supra that the plaintiff there did substantially what the plaintiff did in the case at bar, alleged the facts constituting his remedy or cause of action, and then prayed for two forms of relief—one against Smith individually that the deed be set aside and Smith be compelled to reconvey, etc., or as a sort of an alternative that Smith and Ogden be in effect held as trustees and adjudged to pay the highest price which the land had attained.

In Seaman v. Bandler, 56 N. Y. S. 210, also cited by counsel, the plaintiff had sued one Wiener in an action **at law,** to-wit: in replevin, and **while that action was still pending and undetermined** plaintiff sued defendant Bandler **at law** for the price of the very goods embraced in the replevin suit.

At middle of page 3 (Rep. Br.) counsel says that no authority holds that estoppel is essential to render an election effective. This is not correct in our view as applied to elections in equity, and we again refer to 20 C. J. 25, where the text holds that where the victim of a wrong has inconsistent remedies he may "in the absence of facts creating an equitable

estoppel'' pursue any or all of them until he recovers through one.

> See also to same point Union etc. Co. v. Drake (C. C. A.) 214 F. 536-548, cited and quoted page 50 our Op. Br.

But counsel says (Op. Br. p. 55) that Dunfee has suffered detriment constituting estoppel, to-wit: his expenditures in connection with this suit. Rarely, if ever, has a party been allowed to claim estoppel by matters connected with the identical suit in which the estoppel is claimed. Counsel says these expenditures were incurred in this suit "against the D'Arcy Company." But this suit is also against Dunfee, and Dunfee is simply defending himself and under the guise of estoppel is attempting to charge up his cost in establishing estoppel, and this too all in the same case. Why does counsel assume that this case is solely against the D'Arcy Company, when he must have known from the beginning that the case so far as D'Arcy was concerned was an alternative proposition under Federal Court Rule 25 above referred to? Clearly the action from the beginning was in the main and almost wholly **directed against Dunfee,** and since the opening of the trial and the dismissal of the Orleans Hornsilver Mining Company, **against him exclusively.**

Had we originally sued the Orleans Hornsilver

Mining Company alone and asked for cancellation, etc., and failed in that suit and then had sued Dunfee asking that he be charged as a trustee, there would have been some basis for the claim of election, though we deny that it would lie even then inasmuch as this is a pure suit in equity where the rule as to estoppel by election is substantially different from what it is in an action at law. But in such case if Dunfee had gone to substantial expense, etc., in assisting the Orleans Hornsilver Mining Company to defend itself against our supposed suit for rescission he might in the subsequent suit against himself claim election because of facts constituting estoppel. And that is the sort of expenditure in litigation referred to in the cases cited by counsel (Op. Br. p. 55).

While we do not deem it important, we insist that Dunfee's claim of election comes too late and that the rule is that it must be promptly pleaded and urged. Being a defense not favored in equity (Friederichsen v. Renard 247 U. S. 207, 52 L. ed. 1075-1083-1084) the party claiming it must assert it. The principle is the same as where a complaint discloses on its face that the cause of action is barred by the statute of limitations, it being nevertheless the duty of the defendant to affirmatively plead the defense. But counsel says (Op. Br. p. 56) that Dunfee made the defense as soon as it could be

raised, to-wit: immediately upon dismissal of the Orleans Hornsilver Mining Company. But the fact is that if Dunfee has a right to rely upon "election" at all, such right is in no sense dependent upon the dismissal or other disposition of the case against the Orleans Hornsilver Mining Company. Counsel is correct in saying that the "election" (if there was one) is shown by plaintiff's complaint. Hence Dunfee instead of answering to the merits and saying absolutely nothing about "election" in his answer, could have pleaded election in the answer which was filed many months prior to the trial and to the dismissal of the Orleans Hornsilver Mining Company. Had he done so, the point could have been raised on a motion to dismiss complaint. Plaintiff might thereby have been prepared to intelligently elect between pursuing the real wrong-doer and one charged with having possession of the fruits of the wrong. Dunfee's present proceeding, if successful, would constitute a trap whereby plaintiff after dismissing as to the Orleans Hornsilver Mining Company would, because of so doing be thrown out of court as to Dunfee, without any recourse of further pursuing the Orleans Hornsilver Mining Company.

It has always been the rule in equity that where plaintiff is in doubt whether upon the case made in his bill, he is entitled to one kind of relief or another, he may frame the prayer in the alternative, and the

court may grant the relief to which he is entitled under either alternative, so long as it is consistent with the facts alleged in the bill. Plaintiff may alleged a single state of facts and ask relief in alternatives which are directly opposite or inconsistent with each other.

As squarely supporting this we cite:

21 C. J. 406, Sec. 426 and notes and cases cited.

Equity Rule 25, specifying what a bill in equity shall contain, contains five sub-divisions, the fifth of which refers to the prayer, and reads:

> "5th. A statement of and prayer for any special relief pending the suit or on final hearing, which may be stated and sought in alternative forms."

In the case infra, which was a suit in equity and involved so far as this point is concerned a similar situation, the Court said:

> "the controlling rule in cases of the class to which this suit belongs is that even where the victim of a wrong has inconsistent remedies, and he is doubtful which is the right one, he may pursue any or all of them until he recovers through one, and in the absence of facts creating an equitable estoppel, and there are none in this case, his prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one to victory."

Union etc. Co. v. Drake, (C. C. A.) 214 Fed. 536-548 and cases cited by the Court.

The case above, and others cited infra, go much further than necessary for the purposes of this case, because it will be noted that the rule is firmly established in the Federal Courts that inconsistent **remedies** may be prosecuted and unless there are **facts** estopping, the doctrine of election will not bar relief. In the case at bar it cannot be claimed that there are any **facts** estopping Terwilliger from claiming against Dunfee, such as that Dunfee has been misled to his prejudice, etc., by Terwilliger's prayer for relief against the Orleans Hornsilver Company.

In case infra plaintiff's bill was for cancellation of a contract and deed on ground of fraud. Defendants answered denying fraud. The case was referred to a Master, who found that plaintiff had been induced to enter on the contract by fraud of defendants, and also that plaintiff had taken possession of the land embraced by the contract and cut down considerable timber thereon after the contract attacked was made. The Court found that thereby plaintiff had ratified the contract, whereupon the case was transferred to the law side for damages on amended pleadings and plaintiff proved his case for damages, but defendants, treating transfer to law side and amendment of pleadings as equivalent to commencement of new action, urged that the equity suit for cancellation, being inconsistent with

action for damages, was an election and also relied on Statute of Limitations. The court said:

> "No matter what may be thought of the merit of the doctrine of election of remedies, it is a long observed and deeply intrenched rule of procedure. But, for obvious reasons, it has never been a favorite of equity and it has been specifically decided by this court that the two forms of relief pursued, before and after the amendment of the pleadings in this case, are not so inconsistent but that both may be prayed for in one bill in equity and either granted, as the evidence and the equities of the case may require. . . . At best this doctrine of election of remedies is a harsh, and now largely obsolete rule, the scope of which should not be extended. . . . Thus, we are brought to the conclusion that since the two remedies asserted by the petitioner were alternative remedies, and since the order made, requiring the conversion of the suit in equity into one at law, was entered by the court sitting in chancery, for us to affirm the judgment of the circuit court of appeals that the petitioner, in obeying the order of the trial court, made a fatal choice of an inconsistent remedy, would be to subordinate substance to form of procedure, with the result of defeating a claim which the respondents stipulated had been sufficiently established to justify a verdict against them. This we cannot consent to do."
>
> Friederichsen v. Renard, 247 U. S. 207, 62 L. ed. 1075-1083-1084.

The Supreme Court in the case supra reversed the judgment of the Circuit Court of Appeals, and also the District Court, for the error discussed.

The case infra was a stockholders suit involving many points common to case at bar. Bogert, as minority stockholder of Houston & Texas Central Railroad Company, complained that the Southern Pacific Company, a majority stock-owner, had dominated the business and property of the Houston Company for the benefit of the Southern Pacific Company by taking to itself a mortgage upon the assets of the Houston Company and having the property sold to satisfy the mortgage, pursuant to a re-organization scheme, whereby the Southern Pacific Company took all stock of re-organized company, leaving Bogert and other minority stockholders nothing. Bogert, on behalf of himself and other minority stockholders, first brought suits to have the mortgage foreclosure set aside as fraudulent, but these suits failed because unsupported by the facts, and later Bogert brought suit to compel the Southern Pacific Company to pro-rate the proceeds of such foreclosure proceeding so received by it with Bogert and other minority holders. The Southern Pacific Company squarely raised, among other defenses, the defense of election, but the court held against the defense, and said:

> "And there is no basis for the claim of estoppel by election; nor any reason why the minority, who failed in the attempt to recover on one theory, because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis." (Citing cases.)

Southern Pacific Company v. Bogert, 250 U. S. 483; 63 L. ed. 1099-1107.

We believe that the case supra is decisive against defendant's contention in the instant case, not only on this point but on a number of other points to which the case supra is elsewhere herein cited.

See also Davis v. Berry, (C. C.) 106 Fed. 761-762.
Jones v. Missouri etc. Co., (C. C. A.) 144 Fed. 765-779.
Standard Oil Co. v. Hawkins, (C. C. A.) 74 Fed. 395-398.

An attempt to collect a claim against an assignee by a proceeding against the funds, is not inconsistent with an action to enforce the personal liability of the assignor.

20 C. J. 19, Sec. 15.

In the case infra plaintiff alleged fraud in obtaining a title bond to land, and prayed that bond be cancelled and to have an accounting of rents and profits which purchaser of land had received. On final hearing plaintiffs were permitted to amend by asking in the alternative for a decree for the balance of the purchase money to be paid according to such title bond, and that such balance be decreed a lien on the land, as security for its payment. It was

held there was no new case or inconsistency in the remedy; that the alternative prayer only enabled the court to adapt its relief to the case made by the bill and sustained by the proof. The Court said:

"It is a well settled rule that the complainant, if not certain as to the specific relief to which he is entitled, may frame his prayer in the alternative, so that if one kind of relief is denied another may be granted, the relief of each kind being consistent with the case made by the bill. . . . Under the liberal rules of chancery practice which now obtain, there is no sound reason why the originall bill in this case might not have been framed with a prayer for the cancellation of the contract upon the ground of fraud, and an accounting between the parties, and, in the alternative, for a decree which, without disturbing the contract, would give a lien on the land for unpaid purchase money."

Hardin v. Boud, 113 U. S. 713; 28 L. ed. 1141-1143.

"The seller in a contract of conditional sale does not, by instituting proceedings to enforce a material man's lien, based upon the mistaken theory that the title is passed to the purchaser, make an election which prevents him from bringing suit in replevin based on the theory that title still remains in the seller."

Bierce v. Hutchins, 205 U. S. 340; 51 L. ed. 828-833.

"The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer."

Thomas v. Sugarman, 218 U. S. 129; 54 L. ed. 967-969.

"So the prosecution of a misconceived and unmaintainable action or defense against one person does not preclude an inconsistent action against another. The act of a secured creditor in proceeding against his debtor to enforce payment of a just claim is not in any manner inconsistent with his pursuit of any proper remedy against a third person who wrongfully converts or destroys his security."

20 C. J. 18 and notes 18 and 19.

"Where the victim of a wrong has at his command inconsistent remedies and he is doubtful which is the right one, in the absence of facts creating an equitable estoppel, he may pursue any or all of them until he recovers through one, since the prosecution of a wrong remedy to defeat will not estop him from subsequently pursuing the right one."

20 C. J. 25.

In case infra plaintiff sued in equity to rescind an agreement for misrepresentation and fraud, and this suit was dismissed on its merits. Thereupon plaintiff sued to recover $10,000 as purchase price fixed by the agreement sought to be cancelled in the dismissed equity suit. It was contended the equity suit was an election, that the remedy there sought was the cancellation of the instrument, whereas in the subsequent suit the remedy was by way of affirmance of same. The Court said:

"It is contended that by the institution and prosecution of this suit in equity the plaintiff irrevocably elected to rescind the contract, and thereby estopped himself from maintaining this action

to enforce it. But the fatuous choice of a fancied remedy that never existed, and its futile pursuit until the court adjudges that it never had an existence is no defense to an action to enforce an actual remedy inconsistent with that first invoked through mistake." (Citing cases.)

Barnsdall v. Waltemeyer, (C. C. A.) 142 Fed. 415-420.

To same effect: Harrill v. Davis, (C. C. A.) 168 Fed. 187-195.

In re Stewart, (D. C.) 178 Fed. 463-468.

Nauman Co. v. Bradshaw, (C. C. A.) 193 Fed. 350-354.

In this case the defense of election was not pleaded by Dunfee or in any manner suggested by him until at close of plaintiff's case he moved for a dismissal. The rule is well established that such defense, to be available, must be pleaded. And it will not answer to say that because here the facts relied on for the defense were not de hors the complaint, therefore no plea was necessary, because if the plea were seasonably made the complainant might amend, or the like, so as to avoid anything subsequently occurring upon which estoppel might be based in favor of defendant. This because of the ruling supra that in the absence of facts constituting estoppel the Federal Courts do not recognize the defense of election to any case where plaintiff mistakenly pursues one remedy, even to defeat, and then adopts another one that might be carried to victory.

"An election of remedies being an affirmative

defense, it must be pleaded in order to be available. Such plea should show that the remedy first sought was an available remedy as otherwise no election is shown."

20 C. J. 37, Sec. 32.

See also World's Fair Mining Co. v. Powers, 224 U. S. 173; 56 L. ed. 717-721.

JUDGMENT IS NOT EXCESSIVE

Appellant complaints (Op. Br. p. 51) that the Judgment is excessive. The Complaint alleges (Rec. p. 11-12) that Dunfee assigned lease

> "in consideration . . . that said Orleans Hornsilver Mining Company pay to said defendant, Dunfee, in installments from time to time an aggregate of $50,000 in cash and 150,000 shares of its capital stock."

Dunfee's Answer (Rec. pp. 25-26) admits the foregoing, except as to the amount of the cash consideration which he says was $40,000 instead of $50,000, viz:

> "Denies that the consideration for said assignment was or is the sum of $50,000 or any sum of money in excess of $40,000."

The Judgment is for $40,000.00, just as admitted by Dunfee. We fail to see how Judgment can be claimed excessive when it conforms to the facts established by the pleadings.

ORLEANS MINING AND MILLING COMPANY, THE CORPORATION IS PARTY BENEFICIALLY INTERESTED, AND THE REAL PLAINTIFF—HENCE NO ERROR IN JUDGMENT RUNNING TO "PLAINTIFFS."

In Op. Br. p. 51, it is urged that Judgment is erroneous in running to "plaintiffs" instead of the corporation Orleans Mining and Milling Company, for whose use and benefit the action is prosecuted.

The "plaintiffs" are "C. A. Terwilliger, on behalf of himself and all other stockholders of the Orleans Mining and Milling Company, a corporation, similarly situated." Hence, in adjudging in favor of "plaintiffs" the Judgment runs to plaintiffs in the exact character and capacity in which they sue. Unquestionably the plaintiffs' recovery is the property of the corporation because they sue as stockholders for the use and benefit of all stockholders, i.e., the corporation itself. If it appears that the award is made to "plaintiffs" in their capacity and character as stockholders suing for the use of all stockholders similarly situated, the beneficial ownership is in the corporation and we submit that is all that equity requires. The Judgment simply awards recovery to "plaintiffs" as stockholders suing on behalf of all stockholders similarly situated, and "all stockholders" necessarily comprise the corporation itself.

But we submit that in any event the error, if it be one, is super-technical and does not constitute reversible error because in the first place, no substantial right of appellant is or can be affected, and in the second place, the lower court, either by direction of this court, or by motion, or of its own motion, could reform or correct the record by having the Judgment run to the corporation.

JUDGMENT IS NOT ERRONEOUS IN NOT ALLOWING DUNFEE FOR HIS RISK, TIME, LABOR OR EXPENSE

Appellant now claims (Op. Br. p. 52) that Judgment should be reversed because it did not allow anything to Dunfee for his risk, labor, expense, etc., in connection with the lease transaction. Two cases are cited but we fail to find anything whatsoever in either in support of the claim.

No plea of counter-claim, recoupment, or the like was made by Dunfee for value of his alleged time, labor or expenditures. No claim therefor was made in the testimony and neither is there any evidence of amounts or values upon which any allowance could be based.

Further, Dunfee is a stockholder of the Orleans Mining and Milling Company and when the 150,000 shares of stock and the $40,000.00 is paid into the

company's treasury Dunfee can then make claim and recover against the company for the value of his time, labor and expenditures in the obtainment of the lease. He must first account and pay over the trust stock and money to his fiduciary.

Further, the rule is well established that a fraudulent grantee is not entitled to pay for services performed by him in looking after the property while it was in his possession.

Niday v. Graef, (C. C. A. 9th Cir.) 279 Fed., 941-944.

Nor for improvements.

Blank v. Aronson, (C. C. A. 8th Cir.) 187 Fed., 241-246.

9 C. J., 1267-1268 and N. 69.

The findings, being each and all supported by credible evidence, there can be no "obvious mistake of fact" and we say appellant has not pointed out any error whatever in the application of the law to the facts as found by the trial court and the case is thus squarely within the general rule firmly established that this court will not disturb the findings or the judgment of the trial court.

DATED: Reno, Nevada, October ...., 1926.

Respectfully submitted,
H. R. COOKE and
(COOKE & STODDARD on Brief),
Attorney for Appellees.

No. 4889

United States

Circuit Court of Appeals

For the Ninth Circuit.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture,

Appellee.

Apostles on Appeal.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF COUNSEL.

BYERS & BYERS and JOHN A. HOMER, 310 Marion Building, Seattle, Washington,

Proctors for Petitioner, Kitsap County Transportation Company, Appellant.

HERMAN S. FRYE and WINTER S. MARTIN, 2014 L. C. Smith Building, Seattle, Washington,

Proctors for Ella J. Harvey, Claimant, Appellee. [1*]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 9609.

In the Matter of the Petition of KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation of the State of Washington, Owner of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture, for Limitation of Liability.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Petitioner,

vs.

ELLA J. HARVEY,

Claimant.

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*Page-number appearing at foot of page of original certified Apostles on Appeal.

STATEMENT.

June 4, 1925. This suit was commenced by the filing of a petition for Limitation of Liability by the Kitsap County Transportation Company, a corporation of the State of Washington, owner of the Gas Screw "Suquamish," her tackle, apparel and furniture.

June 4, 1925. Petitioner filed stipulation for costs and notice.

June 5, 1925. Order entered and filed appointing appraisers.

June 9, 1925. Notice of appraisement, oath of appraisers and report of appraisers filed and entered.

June 9, 1925. Order for stipulation for value filed and entered.

June 9, 1925. Stipulation for value filed and entered.

June 10, 1925. Order for monition filed and entered.

June 10, 1925. Issued monition and copy and certified copy of order.

June 12, 1925. Filed Marshal's return on monition.

Sept. 11, 1925. Deposition of Ella J. Harvey filed. [2]

Sept. 26, 1925. Appearance, stipulation for costs and answer of Ella J. Harvey, filed and entered.

Oct. 3, 1925. Objections to claim of Ella J. Harvey filed. Entered Mo. Calendar.

Oct. 24, 1925. Claim for damages for personal injuries of Ella J. Harvey filed.

Oct. 24, 1925. Return of Commissioner Bowman on order *re* filing of claims.

Oct. 26, 1925. Entered order, objections stricken.

Nov. 3, 1925. Entered order for assignment Nov. 23, 1925.

Feb. 15, 1926. Entered order for trial, Feb. 26, 1926.

Feb. 24, 1926. Entered order for trial at foot of admiralty calendar.

March 16, 1926. Entered record day's trial, 2 petitioner's exhibits. (Taken under advisement.)

March 31, 1926. Filed memo. decision. Petitioner's motion denied. Claimant's motion granted. Proceedings dismissed.

April 3, 1926. Filed cost bill. (Taxed at $43.70.)

April 5, 1926. Filed petition for rehearing and for new trial.

April 8, 1926. Filed motion for new trial. Notice thereon.

April 12, 1926. Entered argument on motion for new trial. Authorities to be submitted.

April 13, 1926. Filed brief on motion for new trial and petition [3] for rehearing. (Denied.)

April 13, 1926. Filed exceptions of petitioner.

April 13, 1926. Filed and entered final decree. Costs to claimant.

April 13, 1926. Docket and index.

June 2, 1926. Filed notice of appeal.

June 2, 1926. Notice of appeal served as per acceptance noted on original notice.

June 2, 1926. Filed bond on appeal with approval as to sureties by claimant's proctors and approval of Court noted thereon.

June 2, 1926. Filed assignments of error.

June 2, 1926. Assignments of error served as per acceptance of service noted on original.

June 2, 1926. Filed stipulation as to record and apostles on appeal.

June 2, 1926. Filed stenographic transcript of evidence and proceedings of trial, with stipulation of proctors attached thereto as to correctness and waiver of certificate of trial Judge thereto.

June 2, 1926. Filed stipulation as to sending up original exhibits.

June 2, 1926. Entered order sending up with appeal original exhibits.

June 2, 1926. Filed praecipe for record and apostles on appeal. [4]

June 2, 1926. Issued citation on appeal.

June 2, 1926. Citation on appeal served as per acceptance of service noted thereon.

[Endorsed]: Filed Jun. 2, 1926. [5]

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 9609.

In the Matter of the Petition of KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation of the State of Washington, Owner of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture, for Limitation of Liability.

PETITION FOR LIMITATION OF LIABILITY.

The libel and petition of the Kitsap County Transportation Company, owner of the gas screw "Suquamish" in a cause of action, civil and maritime, alleges as follows:

I.

That your petitioner is a corporation duly organ-

ized, created and existing under and by virtue of the laws of the State of Washington, having its principal place of business in Seattle, Washington, and is the owner of the gas screw "Suquamish," which said vessel is now in the port of Seattle and within the jurisdiction of this Honorable Court.

II.

That on or about the 7th day of December, 1923, while the said gas screw "Suquamish" was on a voyage from Seattle, King County, Washington, to Manitou, Kitsap County, Washington, the said vessel being engaged in commerce upon the navigable waters of the United States upon the waters of Puget Sound, an accident happened on board the said vessel and a claim has been made against the said vessel and a suit thereupon has been brought as hereinafter more fully set forth, on account of defects in the said vessel and in the management of the said vessel. [6]

III.

That the said defects complained of in the said vessel were in truth and in fact a part of the original structure of said vessel and were at all times plainly visible to anyone in the cabin provided for the accommodation of passengers, and the said vessel was at said time manned and equipped in full compliance with the laws of the United States and the rules of navigation in such case made and provided and she had each, every and all of the lights, equipment and appliances required by said rules and laws and was fully found in every particular, and was constructed in all particulars in compliance

with the rules established by the laws of the United States.

IV.

That the said vessel, at the said time had fourteen passengers on board and had earned the sum of $4.90 as fares, and had earned as freight on the said voyage the sum of no dollars, and was in command of Capt. W. O. Hanson, duly licensed and in full compliance with the laws of the United States and the rules of navigation in such case made and provided, and neither her owner nor any representative of her owner was present on the said vessel at the time of the said accident, nor had any knowledge of such accident or the cause thereof until after the time of its occurrence, and the said accident happened and the loss, damage and injury complained of was occasioned, done and incurred without the privity of knowledge of your petitioner. Nevertheless a certain passenger on the said vessel, to wit: Ella J. Harvey, claims to have been injured by the negligence of your petitioner, and claiming to have suffered losses by personal injuries has brought suit against your petitioner in the Superior Court of King County, State of Washington, to recover damages on account of said personal injuries and from various causes arising out of said accident and will continue to prosecute your petitioner unless restrained by this Honorable Court. [7]

V.

That your petitioner is ignorant of the extent of the injuries or losses suffered by the said pas-

senger claiming to have been injured by the said accident except that the said passenger claims to have been injured in the sum of $12,500.00, and that Reames & Frye, attorneys at law, 1323 L. C. Smith Building, Seattle, Washington, are her attorneys, and your petitioner alleges that the amount of the said claim for said injury, loss or damage, occasioned by the said accident greatly exceeds the value of the said gas screw "Suquamish" immediately after said accident, as hereinabove set forth, and any damage or injury done or occasioned or happening to the said claimant was due wholly to her own negligence and lack of care.

WHEREFORE, your petitioner prays that this Honorable Court will cause due appraisement to be had of the value of the said vessel in the condition in which she was immediately after the said accident and upon the ascertainment of said value, make an order for the payment thereof into court, or the giving of a stipulation with sureties thereto, for the payment into said court whenever the same shall be ordered, and will issue a monition against all persons claiming damages for any loss, destruction, damages or injuries occasioned by said accident, citing them to appear before this court and make due proof of their claims at a time therein to be mentioned, and as to all of which claims your petitioner will contest its liability independently of the limitation of liability claimed under the acts and statutes aforesaid, and also that the Court will designate a commissioner before whom proof of all claims presented in pursuance of such monition

shall be made and upon the coming in of the report of said commissioner and of the hearing of the said cause, if it shall appear that this petitioner is not liable for such loss, damage, destruction or injuries, it may be so finally decreed, or in case the Court shall find that your petitioner is liable for said [8] loss, damage, destruction or injuries, then this Court will, by its decree, limit the liability of your petitioner to its interest in the said vessel and that in the meantime and until the final judgment of this Court shall be rendered therein, this Court will make an order restraining the prosecution of any suit or suits against your petitioner in respect to any such claim or claims.

BYERS & BYERS,
Proctors for Petitioner.

State of Washington,
County of King,—ss.

B. S. Murley, being first duly sworn, says that he is the Secy. & Treas. of the above-named petitioner and makes this verification on its behalf; that he has read the foregoing petition, knows the contents thereof and that the said is true except as to those matters set forth on information and belief and as to those matters he believes it to be true.

[Seal] BERT S. MURLEY.

Subscribed and sworn to before me this 3d day of June, 1925.

ALPHEUS BYERS,
Notary Public, Residing at Seattle.

[Endorsed]: Filed Jun. 4, 1925. [9]

[Title of Court and Cause.]

ANSWER TO PETITION FOR LIMITATION AND CLAIM FOR DAMAGES FOR PERSONAL INJURY.

To the Honorable Judges of the District Court of the United States for the Western District of Washington in the Northern Division, Sitting in Admiralty:

The claim and answer of Ella J. Harvey, of Seattle, in the State of Washington, to the petition of the Kitsap County Transportation Company, filed in the above cause, is as follows:

I.

Claimant admits paragraphs I and II of the petition.

II.

Claimant admits in answer to paragraph III of the libel and petition, that said defects of and in said vessel complained of were in fact part of the original structure and hull of said vessel, that is to say, that in the cabin of said vessel set aside for the carriage and accommodation of women passengers, which was located in the hull and hold of said vessel, a raised horizontal platform was built about ten inches above the plane of the cabin deck ranging fore and aft, and extending inboard from the ship's side a distance of about four feet in order to provide a place for seats for passengers. That the seats extend athwartship or at right angles to the keel, in rows, upon said raised platform; that the

rows are placed close together making it more or less difficult [10] for a person to enter the space between the rows of seats. That each row of seats is placed flush with and perpendicular to the side of the raised platform, so that the platform and each row of seats rises abruptly from the deck, and no place, or platform, is provided for a passenger to step upon before stepping into the narrow and restricted space between the rows of seats, while seating herself in the passenger seat provided for her accommodation. That the seats so provided were small and cramped and the space between the rows occupied by the body of the passenger to such an extent that in the case of a woman passenger attired in feminine apparel with the lower part of her person covered with skirts, she could not readily or easily see the platform and the place where it abruptly ends and decends to the main-deck.

That claimant denies that said defects and imperfections were at all times plainly visible, and denies that said vessel was at said time equipped, or manned, in full compliance with the laws of the United States, as set out in said paragraph III of the petition, for the reason that the petitioner well knew the design and build of the platform, and the arrangement of chairs and rows of chairs for the accommodation of women passengers when it adapted said vessel so arranged to the carriage of passengers for hire, and said arrangement was then and there dangerous and unsafe when adapted to ordinary use by women passengers, all of which petitioner then and there, and for a long time prior

thereto well knew. That this dangerous and unsafe condition was from time to time increased and rendered greater by the movement and oscillations of the hull of the vessel while afloat and underway, all of which the owner knew. That said vessel was and is a merchant motor vessel of the United States of 75 gross and 51 net tons, 84 feet long, 14.7 feet wide and seven feet deep. [11]

That by reason of said defective and imperfect condition a passenger in the ordinary and usual manner of arising from or leaving said seat could not see the edge of the platform and was likely to step off suddenly or slip from the platform to the dock in the act of stepping off the platform. That unless a person was warned or constantly reminded of the abrupt descent at the inboard end of the row of seats the passenger would in the ordinary and careful use of the seats and place set apart for them, be likely to step over and off of the platform to his or her resulting injury. That no warning, or notice, of any kind was posted or given to the claimant warning against stepping off of the platform, when she occupied the same, as hereinafter set forth. That by reason of the foregoing premises, the said raised platform, chairs and rows of chairs constituted defects and imperfections in the hull of said vessel in that part thereof especially designed for the accommodation of women passengers within the meaning of Section 4493 of the Revised Statutes of the United States.

III.

Claimant is without sufficient information, or

knowledge, to enable her to answer the allegations of paragraph IV, which commence at line 13 on the second page of the libel and continue to the word "occurrence" in line 22, and therefore denies the same and puts petitioner upon its proof. Claimant denies that "the loss, damage and injury complained of," was without the privity, or knowledge of the petitioner, but on the contrary alleges and avers that petitioner at all times prior to claimant's injury knew of the faulty, defective and imperfect design, build, and arrangement of the said seating platform and its chairs and equipment, when it adapted said "Suquamish" to the carriage of passengers. That the platform so designed, built and equipped, was part of the [12] lower cabin deck and hull of said vessel. That the remaining allegations of paragraph IV of the libel and petition are true.

IV.

Answering paragraph V of the libel and petition, claimant admits making claim and commencing suit against petitioner. That the amount now demanded is Twelve Thousand Two Hundred and Fifteen and 50/100 ($12,215.50) Dollars. That claimant is without sufficient information to enable it to answer the remaining allegations of paragraph V, except that it admits the vessel to have been fairly appraised at ——— Dollars, if a limitation is granted.

V.

That claimant has filed her affidavit and claim duly verified before the Hon. A. C. Bowman, United States Commissioner, in and for the above

District, to whom claim and proof of damage must be made under the monition issued upon the above-entitled petition, within the time allowed therefor, and now presents its claim and answer in the above court and cause for the purpose of contesting petitioner's right to a limitation of liability, and its further right to an exemption from liability.

VI.

That claimant in filing her claim in the above-entitled cause and in answering the petition and libel of the petitioner does not intend to confer jurisdiction upon this court to hear and determine the said cause upon its merits for the reason that an action is now pending in the Superior Court of the State of Washington, for King County, in that said Cause No. 178602 entitled, "Ella J. Harvey, Plaintiff, vs. Kitsap County Transportation Company, a Corporation, Defendant," and unless by lapse of time and loss of witnesses it becomes necessary to submit plaintiff's claim and [13] demand to the above court in order that full justice may be done to claimant, and claimant makes this further answer, claim and demand to the said petition without prejudice to assert and maintaining its cause of action now pending in the Superior Court in the event plaintiff's petition for a limitation of liability be denied.

Thereupon claimant alleges and avers further as follows, to wit: That petitioner was and on and prior to the 7th day of December, 1923, a corporation organized under the laws of Washington which maintained an office for the transaction of business at

Seattle, King County. That it was then and there engaged in business as a common carrier of passengers, then and there operating and managing the said steamship "Suquamish" on a passenger run from Seattle, King County, to Manitou in Kitsap County, Washington. That said steamship, "Suquamish," was on said day unfit, unsafe, defective, insufficient and imperfect within the meaning of Section 4493 of the Revised Statutes of the United States for the carriage of passengers for hire, in that the place set aside for the seating accommodation of passengers was dangerous, unsafe, defective and insufficient for the reasons hereinabove set forth, all of which are referred to for the details thereof.

VII.

That on the 7th day of December, 1923, said claimant, while a passenger on said steamboat as aforesaid, did descend into the cabin of said steamboat and take a seat on the platform thereon. That said claimant on said occasion did not then and there see or notice that the raised platform, where the seats were located, was above the plane of the main-deck. That while seated as aforesaid in the seats as above described, she could not see and did not see the edge of the platform where she was sitting and did not notice that the deck was in fact lower than the platform she was then [14] sitting and resting upon. That claimant in attempting to rise from her seat stepped or slipped off of said platform down to the deck below and falling thereon broke her left hip and left wrist.

VIII.

That claimant was at the time of her injury seventy-five years of age, in good physical condition, and then and there had an expectancy of life of ——— years.

IX.

That as a result of the carelessness and negligence of the said defendant in the construction and accommodation provided, and through the defects and imperfections of the hull of said vessel, and its equipment, and parts thereof, claimant was injured as aforesaid, and as a result of said fall and injury was damaged as hereinafter set forth, to wit:

That she has been confined to her bed ever since the day of her injury. That by reason of the severity of the fracture to claimant's left hip, she has been permanently injured and will be required to use crutches for the remainder of her life. That as a result of her said injury, claimant was confined to her bed approximately eighteen months from the time of said injury, and is now compelled to use a wheeled chair and crutches. That during said time she has suffered great pain and distress in body and mind as a result thereof. That she has required the care of nurses and the constant treatment of physicians. That her nurses, hospital and physicians' bills, medicine, and the expenses incurred incidental thereto are and were as follows, to wit:

Doctor bills	$550.00
Ambulance	11.00
Wheeled chair	17.50
Carried ford.	$578.50

[15]

Brot ford.	$578.50
Hospital bills	561.00
Medicines	25.00
Nurse hire	1051.00
Total	$2,215.50

That in addition to the foregoing items of damage, claimant has sustained a damage of $10,000 for her pain, suffering personal injuries and permanent disability during the period of her expectancy.

WHEREFORE claimant having fully answered the petitioner's petition for limitation of liability and for exemption for liability in the above cause prays:

1. That said limitation be disallowed for the reasons herein set forth.

2. That the prayer of said petition be denied; that the injunction be vacated, and claimant be permitted to prosecute her suit at law now pending in the Superior Court of the State of Washington for King County as hereinbefore alleged and pleaded.

3. That in the event a limitation of liability be granted, that your claimant and respondent have and recover damages in proportion to the amount which shall properly be awarded her upon the limitation value, and that a decree be entered holding

the petitioner liable for plaintiff's injuries and requiring it and its sureties to pay the amount awarded, together with claimant's costs and disbursements in said cause.

WINTER S. MARTIN,
HERMAN S. FRYE,
Proctors for Claimant. [16]

United States of America,
Western District of Washington,
Northern Division,—ss.

Herman S. Frye, being first duly sworn, upon his oath deposes and says:

That he is the attorney and proctor for the claimant above named; that he has read the foregoing answer to petition for limitation and claim for damages for personal injury and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That affiant makes this verification for and on claimant's behalf for the the reason that Ella J. Harvey is now within the Western District of Washington.

HERMAN S. FRYE.

Subscribed and sworn to before me this 25th day of September, 1925.

[Seal] WINTER S. MARTIN,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed Sep. 26, 1925. [17]

[Title of Court and Cause.]

OBJECTIONS TO CLAIM OF ELLA J. HARVEY.

Comes now the petitioner herein and objects to the claim of Ella J. Harvey, the claimant, on the ground and for the reason as set forth in the petition for limitation of liability herein and for the further reason that if the said claimant has suffered any damages, as in her claim alleged, it was on account of her own negligence and lack of care, and not on account of any fault or lack of care of this petitioner.

BYERS & BYERS,
Proctors for Petitioner.

State of Washington,
County of King,—ss.

Bert S. Murley, being first duly sworn, on oath deposes and says: That he is the secretary of the petitioner above named; that he has read the foregoing objections to the claim of the claimant Ella J. Harvey herein, and that the statements made therein are true.

BERT S. MURLEY.

Subscribed and sworn to before me this 2d day of October, 1925.

ALPHEUS BYERS,
Notary Public in and for the State of Washington,
Residing at Seattle.

Due service hereof by copy admitted this 3d day of October, 1925.

HERMAN S. FRYE,
Proctor for Claimant, Ella J. Harvey.
R.

[Endorsed]: Filed Oct. 3, 1925. [18]

[Title of Court and Cause.]

DECISION.

These are usual proceedings and pleadings in limitation of a ship owner's liability, wherein is but one claimant. At the conclusion of the evidence each party moves to dismiss the other's case.

The evidence discloses that petitioner built and for 14 years has operated the "gas screw" vessel "Suquamish" in the passenger trade upon Puget Sound. She is of 75 gross tons, with capacity for 146 passengers. Below her main-deck and reached by stairs from it is a passenger cabin extending for the greater part of the vessel's length. Down the center of this cabin is an aisle about 4 feet wide, on each side of which, raised 10 inches, is a platform. These platforms are about 4 feet wide, extend to the sides of the vessel, and from end to end are occupied by seats, in lines transverse to them. The seats are like theatre seats, two in line, are 29 inches from back to back (front to rear), and the aisle seats are about 2 inches from the edges of the platforms. This construction was adopted to afford head clearance over the aisle, to enable pas-

sengers to see out the windows, and to afford space for 2 seats otherwise prevented by the curvature of the sides of the vessel. As passengers, Harvey and her daughter occupied adjoining seats, the former the aisle seat. Arriving at the landing, Harvey failed to successfully navigate the step down to the aisle, fell, and suffered severe injuries. Thereupon in a state court and against petitioner, Harvey brought suit for damages, alleging her injuries were due to petitioner's negligence in construction of aisle and platform as aforesaid. These instant proceedings followed. [19]

The statutes which limit ship owners' liability and to which petitioner appeals, are §§4283, 4493, R. S. The first avails owners against every person in respect to any default of shipmaster or crew, "without the privity or knowledge" of the owner, and the second likewise. That is to say, that so far as here involved, these statutes do not relieve owners from liability for any *their own* negligence, the second section "only declaring in the particular case, what is two in all, that if the injury or loss occurs through the fault of the owner he will be personally liable, and cannot have the benefit of limited liability."

Butler vs. Co., 130 U. S. 527;

Faxor, 75 Fed. 312.

Now, in the instant proceedings it is very clear that if claimant is entitled to recover, it is because of a condtion of the *hull* (see The Europe, 175 Fed. 608, 190 Fed. 479) of the vessel, which was actually created and maintained by petitioner—be-

cause of and by reason of known defects and imperfections. Hence, all within petitioner's privity and knowledge. That is to say, the grounds upon which alone a ship owner's liability can be limited are conspicuously absent. That ends these proceedings. For "if, in those proceedings it should appear that the disaster did happen with his privity and knowledge, * * * he would not obtain a decree for limited liability."

Butler vs. Co., *supra.*

The principal object of the proceedings having failed, the incidentals fail with them; and claimant is entitled to pursue her common-law remedy and case,—if she has any. See The Erie Lighter 108, 250 Fed. 490; Weishaar vs. Co., 128 Fed. 397; Certiorari denied, 194 U. S. 638.

Petitioner's motion is denied, and claimant's is granted. Proceedings dismissed. Decree accordingly.

March 30, 1926.

BOURQUIN, J.

[Endorsed]: Filed Mar. 31, 1926. [20]

[Title of Court and Cause.]

PETITION FOR REHEARING AND FOR NEW TRIAL.

To the Honorable Judge of the Above-entitled Court:

Comes now the Kitsap County Transportation Company, a corporation of the State of Washing-

ton, and respectfully petitions the Court to grant a new trial and rehearing herein on the ground and for the reason that the decision of the court heretofore made and entered herein is contrary to the law and the evidence.

This petition is based upon the files and records herein.

BYERS & BYERS,
JOHN A. HOMER,
Proctors for Petitioner.

Service hereof by copy admitted this 3 day of April, 1926.

HERMAN S. FRYE,
Proctor for Claimant.

Denied.

BOURQUIN, J.

[Endorsed]: Filed Apr. 5, 1926. [21]

United States District Court, Western District of Washington, Northern Division.

IN ADMIRALTY—No. 9604.

In the Matter of the Petition of KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation of the State of Washington, Owner of Gas Screw "SUQUAMISH," for Limitation of Liability.

FINAL DECREE.

Upon final hearing of the petition for limitation of liability in the above-entitled cause, the

petitioner being represented by its officers and proctor, and claimant and respondent, Ella Harvey, being represented by her proctors, the said parties having submitted their proof upon issues of the cause, the Court after hearing and argument now considers and decrees:

That said petition for the limitation of liability be denied and said cause be and it is hereby dismissed.

IT IS FURTHER DECREED that the injunction and restraining order heretofore issued as of course in the above cause against Ella J. Harvey, and all other persons restraining and enjoining her and said persons from prosecuting her cause or any cause of action against petitioner in the Superior Court of Washington for King County, or in any other court, be and it is hereby vacated, set aside and held for naught.

IT IS FURTHER DECREED that claimant, Ella J. Harvey, have and recover her taxable costs and disbursements in the above cause.

Done at Chambers this 13th day of April, 1926.

BOURQUIN,

United States District Judge.

Copy received this April 2d, 1926.

BYERS & BYERS,

[Endorsed]: Filed Apr. 13, 1926. [22]

[Title of Court and Cause.]

EXCEPTIONS OF PETITIONER.

Comes now the Kitsap County Transportation Company, the petitioner herein, and hereby excepts as follows:

I.

Excepts to the failure and refusal of the Court to make and enter findings of fact herein.

II.

Excepts to the refusal of the Court to find that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by claimant.

III.

Excepts to the failure and refusal of the Court to find that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injuries by her.

IV.

Excepts to the failure and refusal of the Court to find that there was no defect in the vessel or hull causing any damage or injury to claimant.

V.

Excepts to the failure and refusal of the Court to find and rule that any injuries or damage sustained by claimant were occasioned without any privity or knowledge on the part of petitioner. [23]

VI.

Excepts to the refusal of the Court to grant a rehearing and new trial herein.

VII.

Excepts to the order of the Court denying petitioner's motion for a rehearing and new trial.

VIII.

Excepts to the form and substance of the order and decree signed herein dismissing petition for limitation of liability.

IX.

Excepts to the signing and filing of the decree herein dismissing the petition of the petitioner herein for limitation of liability.

X.

Excepts to the refusal of the Court to fix an amount for and authorizing the furnishing of a supersedeas bond herein by petitioner superseding the order and decree entered herein dismissing the petition.

BYERS & BYERS,
JOHN A. HOMER,
Proctors for Petitioner.

Each and all of the foregoing exceptions of the petitioner are hereby noted and allowed.

BOURQUIN,
Judge.

[Endorsed]: Filed Apr. 13, 1926. [24]

[Title of Court and Cause.]

NOTICE OF APPEAL.

To Ella J. Harvey and to Herman S. Frye and Winter S. Martin, Her Proctors, and to the Clerk of the Above-entitled Court:

You, and each of you, will please take notice that the Kitsap County Transportation Company, a corporation, hereby appeals from the final decree of the above-entitled court in the above-entitled cause, and from the whole thereof, which decree was made, entered and filed in said cause on or about the 13th day of April, 1926, to the United States Circuit Court of Appeals for the Ninth Circuit.

KITSAP COUNTY TRANSPORTATION COMPANY,

By BYERS & BYERS, and
JNO. A. HOMER,
Its Proctors.

Copy of the within notice of appeal received this 2d day of June, 1926.

WINTER S. MARTIN,
HERMAN S. FRYE,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Filed Jun. 2, 1926. [25]

[Title of Court and Cause.]

ASSIGNMENTS OF ERROR ON BEHALF OF KITSAP COUNTY TRANSPORTATION COMPANY, PETITIONER.

I.

The Court erred in this: That it failed and refused to make and enter findings of fact.

II.

The Court erred in this: That it failed and refused to find and decide that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by the claimant.

III.

The Court erred in this: That it failed and refused to find and decide that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injuries sustained by her.

IV.

The Court erred in this: That it failed and refused to make any finding or decision on the question of whether petitioner was guilty of negligence which caused or contributed to the injuries and damages, if any, sustained by claimant. [26]

V.

The Court erred in this: That it failed and refused to make any findings and decision on the question of whether claimant was guilty of contributory negligence which was the proximate

cause of the injuries and damages, if any, sustained by her.

VI.

The Court erred in this: That it held and decided that if claimant was entitled to recover it was because of the condition of the hull which was actually created and maintained by petitioner and because of and by reason of known defects and imperfections within petitioner's privity and knowledge.

VII.

The Court erred in this: That it failed and refused to find and decide that there were no defects in the vessel or hull which caused or contributed to the injuries and damages, if any, sustained by claimant.

VIII.

The Court erred in this: That it failed and refused to find and decide that the damages and injuries, if any, sustained by claimant, were occasioned without any privity or knowledge on the part of petitioner.

IX.

The Court erred in this: That it failed and refused to grant a rehearing and new trial, and overruled and denied petitioner's motion for a rehearing and new trial.

X.

The Court erred in this: That it entered herein an order, judgment and decree dismissing the petition of petitioner for limitation of liability and awarding costs against petitioner. [27]

XI.

That Court erred in this: That it failed and refused to authorize and fix the amount of a supersedeas bond herein superseding the order and decree herein dismissing petition of the petitioner.

KITSAP COUNTY TRANSPORTATION COMPANY,

By BYERS & BYERS and
JNO. A. HOMER,

Its Proctors.

Copy of the within assignment of error received June 2d, 1926.

WINTER S. MARTIN,
HERMAN S. FRYE,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Filed Jun. 2, 1926. [28]

[Title of Court and Cause.]

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, That we, Kitsap County Transportation Company, a corporation, as principal, and Massachusetts Bonding & Insurance Company, a corporation, duly organized under the laws of the Commonwealth of Massachusetts, and authorized to do business as a surety company under the laws of the state of Washington, as surety, are held and firmly bound unto Ella J. Harvey in the full and just sum of Two Hundred and Fifty Dollars ($250.00), to be paid to said obligee, or to her proctors, heirs, successors, executors, administrators or assigns, to

which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally by these presents.

SEALED with our seal and dated this 2d day of June, 1926.

WHEREAS lately in the District Court of the United States for the Western District of Washington Northern Division, in a suit in admiralty depending in said court, In the Matter of the Petition of the Kitsap County Transportation (word Company omitted), a corporation, owner of the Gas Screw "Suquamish" her tackle, apparel and furniture, for limitation of liability, the Kitsap County Transportation Company, a corporation, petitioner, and Ella J. Harvey, claimant, a decree [29] was entered dismissing the petition of said Kitsap County Transportation Company and said principal to this obligation has appealed to remove said cause to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree in the aforesaid cause, and a citation having issued directed to said Ella J. Harvey, claimant, citing and admonishing her to be and appear in the said United States Circuit Court of Appeals in the City of San Francisco, California, on the 2 day of July, 1926,—

NOW, THEREFORE, the condition of the above obligation is such that if said principal shall prosecute its appeal to effect and pay the costs if said

appeal is not sustained, then the above obligation to be void; else to remain in full force and effect.

KITSAP COUNTY TRANSPORTATION COMPANY.

By BYERS & BYERS and
JNO. A. HOMER,
Its Proctors.

MASSACHUSETTS BONDING AND INSURANCE COMPANY.

By H. S. JACKSON, [Seal]
Attorney-in-fact.

The foregoing bond is hereby approved as to form and sufficiency of sureties and a copy thereof received this 2d day of June, 1926.

WINTER S. MARTIN,
HERMAN S. FRYE,
Proctors for Ella J. Harvey, Claimant.

Approved.

NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 2, 1926. [30]

[Title of Court and Cause.]

STIPULATION AS TO RECORD AND APOSTLES ON APPEAL.

It is hereby stipulated by and between Kitsap County Transportation Company, petitioner, through its proctors, Byers & Byers, and Ella J. Harvey, claimant, through her proctors, Herman S. Frye and Winter S. Martin, as follows, to wit:

Stipulations for costs were duly filed by petitioner and claimant, and that in making up the record on the appeal of petitioner to the Circuit Court of Appeals, that the apostles on appeal shall include and that the Clerk of the District Court shall include therein, the following and nothing more:

1. Caption exhibiting proper style of the court and title of the cause, names of the parties, etc.
2. Statement showing time of commencement of suit, etc.
3. Petition for limitation of liability of the Kitsap County Transportation Company.
4. Answer to petition for limitation of liability and claim for damages for personal injuries of Ella J. Harvey.
5. Objections of petitioner to claim of Ella J. Harvey.
6. Memorandum decision of Bourquin, Judge.
7. Petitioner's petition for rehearing and for new trial. [31]
8. Minute entry showing denial of petition for rehearing and for new trial.
9. Final decree of court.
10. Exceptions of petitioner.
11. Notice of appeal with admission of service.
12. Bond on appeal with notations of approval.
13. Transcript of trial, proceedings and evidence including deposition of Ella J. Harvey.
14. Stipulation as to evidence.

15. Assignments of error with admission of service.
16. Stipulation as to record and apostles on appeal.
17. Stipulation as to transmittal of original exhibits.
18. Order directing transmittal of original exhibits.
19. Clerk's certificate.
20. Citation on appeal, with admission of service.

Dated at Seattle, Washington, June 2d, 1926.

KITSAP COUNTY TRANSPORTATION COMPANY.

By BYERS & BYERS and
JOHN A. HOMER,
Its Proctors.

HERMAN S. FRYE,
WINTER S. MARTIN,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Filed Jun. 2, 1926. [32]

[Title of Court and Cause.]

STIPULATION AS TO TRANSMITTAL OF ORIGINAL EXHIBITS.

It is hereby stipulated by and between the Kitsap County Transportation Company, petitioner, through its proctors, Byers & Byers, and Ella J. Harvey, claimant, through Herman S. Frye and Winter S. Martin, that the original exhibits herein, to wit: Petitioner's Exhibit No. 1 (Certificate of

Inspection), and Petitioner's Exhibit No. 2 (Photograph), instead of copies thereof, shall be sent up by the Clerk of the District Court to the Circuit Court of Appeals as a part of the record on appeal herein.

Dated at Seattle, Washington, June 2d, 1926.

KITSAP COUNTY TRANSPORTATION COMPANY.

By BYERS & BYERS and
JNO. A. HOMER,
Its Proctors.

HERMAN S. FRYE,
WINTER S. MARTIN,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Filed Jun. 2, 1926. [33]

[Title of Court and Cause.]

ORDER FOR SENDING UP ORIGINAL EXHIBITS.

Agreeably to the written stipulation of the parties herein, and it being in the opinion of the undersigned Judge deemed proper that the Clerk of this court making up the record on appeal herein shall include therein as a part of the record on appeal the originals, instead of the copies of all exhibits, to wit: Petitioner's Exhibit No. 1 (Certificate of Inspection) and Petitioner's Exhibit No. 2 (Photograph), introduced in evidence in the trial of this cause; it is

ORDERED, That said original exhibits, instead of copies, shall be sent up by the Clerk of this court as a part of the record on appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit.

Done at Chambers this 2d day of June, 1926.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed Jun. 2, 1926. [34]

[Title of Court and Cause.] [35]

INDEX.

PETITIONER'S WITNESSES:

	Direct	Cross	Redirect	Recalled Direct	Recalled Cross
Anderson, J. L.....	25	27			
Brinton, Fred S.....	14	15	18	49	49
Coolidge, L. H.....	9	10			
Macbride, Philip D....	3	5		45	47
Murley, Bert S.....	19	20			
Taylor, Chas. E.....	21	22			
CLAIMANT'S WITNESSES:					
Dawson, Dr. Lewis R...	37				
Moses, Clyde M.....	29	35		42	44
Harvey, Mrs. Ella J. (Deposition)	37	41	45		

PETITIONER'S EXHIBITS.

No. 1—Page 20—Certificate of Inspection.
No. 2—Page 47—Photograph. [36—1]

[Title of Court and Cause.]

PROCEEDINGS HAD MARCH 16, 1926.

BE IT REMEMBERED, that heretofore and on, to wit, March 16, 1926, at the hour of 2:00 o'clock, P. M., the above-entitled cause came on regularly for trial in the above-entitled court, and before the Honorable GEORGE M. BOURQUIN, one of the Judges of said court.

The petitioner appearing by Byers & Byers, their attorneys and counsel.

The claimant appearing by Messrs. H. S. Frye and Winter S. Martin, her attorneys and counsel.

Thereupon the following proceedings were had and testimony taken, to wit: [37—2]

TESTIMONY OF PHILIP D. MACBRIDE, FOR PETITIONER.

PHILIP D. MACBRIDE, a witness called in behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. State your name, please.

A. Philip D. Macbride.

Q. Where do you reside? A. In Seattle.

Q. How long have you resided here?

A. Practically 18 years.

Q. What position, if any, do you now occupy with the petitioner? A. Vice-president.

(Testimony of Philip D. Macbride.)

Q. How long have you been connected with the Kitsap County Transportation Company?

A. Since the spring of 1917—April, 1917.

Q. You are acquainted with the vessel "Suquamish"? A. Yes.

Q. What position did you occupy on the 7th day of December, 1923?

A. Secretary and Treasurer of the Kitsap County Transportation Company.

Q. I will ask you, in regard to this vessel "Suquamish"—I will call your attention to the cabin of this vessel. Is the cabin constructed in the same manner as is usual and customary in vessels of this type and class?

Mr. MARTIN.—Your Honor, we object to that question. It is not material as to construction of other vessels.

The COURT.—Sustain the objection. [38—3]

Q. How long have you been engaged in the shipping business and especially in connection with this kind and class of vessels?

A. I have been acquainted with the Puget Sound steamboats and vessels for something over 13 years.

Q. Are you acquainted with vessels of this type and class on Puget Sound?

A. I know nearly all of them.

Q. I would like to ask you if this cabin is equipped as is usual of her type and class?

A. It has the standard type of equipment and construction.

Q. How long has this vessel been in operation?

(Testimony of Philip D. Macbride.)

A. It was constructed in 1914.

Q. Has it remained, as far as the seats are concerned—the way they are placed, from that time to this? A. Yes, continuously.

Q. Has it been carrying passengers all the time?

A. It has been in continuous operation carrying passengers since it was first commissioned in the summer of 1914.

Q. How many passengers has it carried since that time?

Mr. MARTIN.—That is immaterial, your Honor.

The COURT.—Overrule the objection.

A. It has averaged 3,500 passengers a month, over 40,000 per year, which would make approximately half a million passengers.

Q. Were any of the officers of the company ever notified of, or did any accident of this kind ever occur theretofore? A. No. [39—4]

Cross-examination.

(By Mr. MARTIN.)

Q. Mr. McBride, attention has been called to one cabin. This vessel has several, has it not?

A. Two.

Q. The one Mrs. Harvey was in, the after-cabin, is called the "Ladies" cabin, is it not?

A. That is right.

Q. The after-cabin is located down below the decks, is it not?

A. Yes—the main-deck is cut at that point.

Q. Then you have a fore-cabin or a smoker for men? A. Yes.

(Testimony of Philip D. Macbride.)

Q. Is that on the same level as the after-cabin?

A. Approximately, not exactly.

Q. Then, have you an upper cabin where the people walk? A. No, those are the two cabins.

Q. And above that is the main-deck?

A. Not "main-deck." The roof of the ladies' cabin forms the boat-deck.

Q. This ladies' cabin, you say, has been in this same condition since the time it was built in 1914?

A. Yes.

Q. That cabin is arranged with a center aisle right above the keel, with a decking over the keel, but right above the keel, ranging fore and aft, in the center of the vessel?

A. Not decking, floor, the cabin floor. The center of the boat is the keel, and the floor is three feet above the keel.

Q. Now, this aisle has, on each side of it, a raised platform for seats, for the seats of the passengers, has it not? [40—5] A. That is right.

Q. This raised platform is about ten inches above the horizontal plane of the aisle, is it not?

A. The platform on either side, on which the seats are fastened is between nine or ten inches above the aisle down the center of the cabin.

Q. That aisle is how wide?

A. About four feet, I should think.

Q. And the platform, which is raised in the center alongside of the aisle to this height of nine or ten inches, runs off to nothing where it meets the sheer of the bilge as it comes up?

(Testimony of Philip D. Macbride.)

A. Yes, it extends over to the side of the vessel right below the windows.

Q. So that upon this platform is then arranged tiers of seats which run across the vessel at right angles to the keel?

A. Two seats on each side; pairs of theatre seats. The usual theatre seat, as you see them in the picture shows.

The COURT.—There are more than two seats on each platform?

Mr. MACBRIDE.—Oh, yes; thirty or forty.

Q. And these seats are at right angles to the keel?

A. Yes.

Q. So that the passengers can sit looking forward into the vessel? A. Yes.

Q. With windows on each side? A. Yes.

Q. And an aisle ranging fore and aft?

A. Yes. [41—6]

The COURT.—Do the seats all face the same way?

Mr. MACBRIDE.—All except at the very front of the cabin.

Q. There is one tier after another so that in sitting in one seat, the back of another seat is in front of you?

A. Yes. Except in the front end of the cabin, there are two seats facing back.

Q. It is a further fact in connection with this, is it not, that the seats are placed flush with the perpendicular side of this platform? Do the seats come right out flush?

(Testimony of Philip D. Macbride.)

A. No, the sides of the seats are set in, I should say an inch. Just enough to get security for the clamp on the bottom of the casting.

Q. And these seats all range one behind the other in this row, each seat being arranged in the manner that you described and each seat would be fastened to this raised platform an inch from the edge?

A. Something like that—very close to the edge, something like an inch.

Q. There is no appreciable place to step on as you enter the seat?

A. You step into the space. You step on to the platform.

Q. To step from the raised deck up ten inches in between the seats, you have no appreciable place to rest the foot on before going into the seat?

A. There would be no object in stepping on the outside of the casting.

Q. There is not room there and it was not so intended? A. No. [42—7]

Q. That condition has been true of your vessel every since it was built?

A. It is now in exactly the same condition as it was originally constructed.

Q. Now, when you were asked by counsel whether you ever had any complaints, you, of course, speak for the time since you joined this company in 1917?

A. I would not know anything about complaints before that time but I know there were no suits before that.

(Testimony of Philip D. Macbride.)

Q. Isn't it true that you have had complaints and that people have been hurt stepping down abruptly when leaving the seats and falling?

A. No, sir.

Q. That people have been injured?

A. No, sir.

Q. You never received a complaint?

A. No, sir.

Q. Do you know that Mr. Melvin Moses, on June 12th, fell headlong between the seats when he attempted to step out from one of them and was very severely shaken up and bruised? A. No, sir.

Q. Mr. Henkle was president of the company at that time?

A. Yes, he was president up until the time of his death.

Q. Didn't Mr. Henkle ever talk with you in connection with this case—the case of this other man who was hurt in the same manner? A. No.

Witness excused. [43—8]

TESTIMONY OF L. H. COOLIDGE, FOR PETITIONER.

L. H. COOLIDGE, a witness called in behalf of the petitioner, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. State your name. A. L. H. Coolidge.

Q. Where do you reside? A. In Seattle.

Q. How long have you lived here?

(Testimony of L. H. Coolidge.)

A. About 30 years.

Q. What is your business, or profession?

A. Naval architect.

Q. How long have you been practicing your profession in this city? A. Ninteen years.

Q. Are you acquainted with the gas screw "Suquamish"? A. Yes.

Q. How long have you been acquainted with that vessel? A. Ever since it was built.

Q. I will ask you if your profession has brought you in connection with the building of vessels of that type and kind? A. Yes.

Q. Calling your attention to the after-cabin of the "Suquamish," I will ask you if that cabin is constructed as is usual in vessels of that type and class?

A. I think it is.

Q. How about the arrangement of the seats? Is that the usual and ordinary construction of vessels of that type and class? [44—9]

A. It is not unusual.

Q. I will ask you, Mr. Coolidge, if the seating facilities and the platform, or level space upon which they are placed, is any part of the hull of the vessel?

A. It is not.

Cross-examination.

(By Mr. MARTIN.)

Q. Is this vessel built with a keelson?

A. I could not say.

Q. You didn't have anything to do with building this vessel?

(Testimony of L. H. Coolidge.)

A. I had something to do with the installation of the engine.

Q. Are you familiar with the interior of the after-cabin? A. Yes.

Q. Can you tell, from an examination of the cabin, whether there is a raised keelson over the keel to which the timbers and frames are fastened.

A. Not without looking purposely—taking up the flooring.

Q. The fact is, the aisle flooring is built over the frames of the vessel right down on the skin of the vessel—right down on the timbers, as a matter of fact?

A. No, I would not say it was.

Q. What would the flooring rest on?

A. Rests on the frame.

Q. The fore and aft frames?

A. The main frame of the vessel.

Q. It would rest on the main frames?

A. The ends of the beams would.

Q. What is the reason for the raised platform on each side of the aisle?

A. Well, you get a lower center of gravity on the vessel by keeping [45—10] the floor as low as possible in the center, and also there is an opportunity for those in the seats to see out the windows by making a slight rise on each side.

Q. There is, however, no particular reason for not having a one flooring which would be level and run from one side of the ship to the other, is there?

(Testimony of L. H. Coolidge.)

A. Yes, for the reason just stated. It tends to raise the center of gravity.

Q. How much water does this vessel draw?

A. Approximately five feet.

Q. How high is the surface above the water, the freeboard? A. About 32 inches, I would say.

Q. The cabin rises from the main part of the vessel? A. Yes.

Q. Would ten inches difference on each side of the aisle make any material difference in the center of gravity in that vessel? A. Yes.

Q. How long is this vessel?

A. I think she is 87 feet.

Q. And she draws five feet of water? A. Yes.

Q. Ten inches would make some difference, would it not?

A. Yes, I cannot tell how much difference it would make at this time, but it would make a difference.

Q. Did you ever make any measurements on that vessel? A. No, I have no figures on it.

Q. Well, now, you have examined this vessel and you have made comparisons with other vessels on the Sound which carry passengers? [46—11]

Q. How many have a center aisle with a raised platform, ten inches on each side?

A. Three, I believe.

Q. What ones are they?

A. The "Dr. Martin," "The Falcon"—

Q. How long is the "Dr. Martin"?

A. I would say about 65 feet; I am not certain.

(Testimony of L. H. Coolidge.)

Q. How much water does she draw?

A. I could not say.

Q. How long is "The Falcon"?

A. Eighty-five feet, I would say.

Q. Well, what other one?

A. The other boat is one designed for parties here but she has not yet been constructed.

Q. You compared this vessel with two which are constructed and one which has not yet been constructed? A. Yes.

Q. And each was designed with the aft-cabin center aisle and raised platform on each side?

A. Yes.

Q. How many passenger vessels of this type are on the Sound? A. I could not say.

Q. Somewhere around one hundred?

A. Possibly so.

Q. And you call it a safe arrangement for the seats to be arranged to come right out flush with the perpendicular side of that platform?

A. I would say as safe as any other step made use of in vessel designing.

Q. You think that a better arrangement than to have the seats [47—12] set over to provide space at least for foot clearance so the passengers will have stepping room before going between the seats?

A. I would prefer this arrangement, or the arrangement in this boat, to that.

Q. The flush arrangement? A. Yes.

Q. Take this case, where a lady 75 years of age sets down between seats, momentarily forgetting the

(Testimony of L. H. Coolidge.)

drop, steps off, and sustains severe injuries—don't you think it would have been a better arrangement if the seats had been set over on the platform so as to have had space clear of the chairs?

Mr. BYERS.—Your Honor, we object *this* this as purely argumentative.

The COURT.—This witness is an expert and he may answer.

A. No, sir.

The COURT.—Did you measure the space between these seats?

Mr. COOLIDGE.—No, I didn't measure it with a rule.

The COURT.—What is your judgment as to the width between facings of the seats vertically?

Mr. COOLIDGE.—About four feet is the width of the aisle.

The COURT.—I mean between the rows of seats.

Mr. COOLIDGE.—About twenty-nine inches back to back.

The COURT.—Did you measure this distance? [48—13]

Mr. COOLIDGE.—No, we have in our minds the general spacing for seats.

Witness excused.

TESTIMONY OF FREDERICK S. BRINTON, FOR PETITIONER.

FREDERICK S. BRINTON, a witness called in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. State your name.

A. Frederick S. Brinton.

Q. Where do you live? A. In Seattle.

Q. How long have you lived here?

A. Since 1907.

Q. What is your business?

A. Naval architect.

Q. Are you acquainted with the gas screw "Suquamish"? A. Yes.

Q. Did you design and build her?

A. The work was done in our office.

Q. I will ask you, calling your attention to the after part of the vessel, if the seating arrangement and appliances or equipment on which to place the seats is a usual and standard type for that class of vessels? A. Yes.

Q. The seating arrangement is the same now as the way you designed it? A. Yes.

Q. And I would ask you if that equipment, the platform upon which the seats are placed, is that any part of the hull [49—14] of the vessel?

A. No, sir.

(Testimony of Frederick S. Brinton.)

Cross-examination.

(By Mr. MARTIN.)

Q. Isn't the platform built right over the timber frames, or ribs?

A. The platform touches the ribs on the outside —not part of the hull.

Q. Isn't the skin of the vessel part of the hull?

A. The cabin flooring is not part of the hull.

Q. What is the difference between the skin and the cabin floor?

A. The skin of the vessel is part of the structural part of the vessel intended to give the vessel strength. The cabin floor is the place for people to stand.

Q. When it is made fast to the frame of the vessel, doesn't it perform the same functions as the skin?

A. No, sir. The skin of the vessel is put on for two reasons—to keep out the water, and to give fore and aft strength; the cabin floor is for persons to stand on. The cabin floor does not touch the skin of the vessel.

Q. But isn't the skin under that?

A. Sure it is.

Q. The skin of the vessel corresponds on the inside lining the same as planking the outside lining?

A. There is no skin on this vessel.

Q. The skin of the vessel corresponds to the planking on the outside—the inside lining of the vessel? A. We haven't got any "skin."

(Testimony of Frederick S. Brinton.)

Q. I am not talking about this vessel—any vessel? [50—15]

A. We don't call it "skin." We call it "ceiling."

Q. Then the ceiling of the vessel is the inside lining? A. Yes.

Q. Placed over the ribs? A. Yes.

Q. And the ribs run at right angles to the keel?

A. Yes.

Q. The outside planking covers the ribs?

A. Yes.

Q. The inside ceiling covers the ribs on the inside? A. Yes, we have a ceiling.

Q. Haven't you heard the term "skin" used as "ceiling"? A. Not by a Naval Architect.

Q. By people generally?

A. I don't think so.

Q. Then on any vessel the ceiling is under the flooring? A. No.

Q. Then the flooring does come down on the timbers? A. Doesn't touch the timbers.

Q. To what is it made fast? A. The beams.

Q. So that there are beams that run at right angles with the keel?

A. Yes. The beams run right across the vessel.

Q. On the center aisle over the beams are placed fore and aft flooring? A. Yes.

Q. Do you, as a Naval Architect, Mr. Brinton, mean to say that this does not strengthen a vessel? A. It is not put there for that purpose. [51—16]

(Testimony of Frederick S. Brinton.)

Q. Doesn't it serve that purpose? A. No, sir.

Q. You say it does not add strength to that vessel?

A. No. It would be just as strong if it didn't have the flooring in there.

Q. And then on each side of the center aisle is this raised platform ten inches in height?

A. Yes.

Q. Which extends out to the side of the vessel?

A. Yes.

Q. What does that rest on?

A. Flooring—cabin flooring.

Q. Now, are the seats on that raised platform flush with the perpendicular side of the platform along the aisle?

A. Approximately so.

Q. Why isn't some arrangement made for people to step on the platform so they might enter the space between the seats?

A. Didn't think it was necessary.

Q. You say this is the commonly accepted type on Puget Sound? A. Yes.

Q. To what vessel do you refer as having that platform?

A. Well, it is not original with us, there are quite a number of them.

Q. Well, what vessel is equipped and built in that manner—with the seats flush with a ten-inch platform?

A. The "Doctor Martin," the "Mercer" and I think the "Falcon" and a number of others.

(Testimony of Frederick S. Brinton.)

Q. There are several of the small vessels 60 to 100 feet long on the Sound—?

A. A large number, yes. [52—17]

Q. There are many more that have flat *plaint* decks—horizontal cabin-decks?

A. I could not say.

Q. How many of those vessels have you examined? A. Not very many.

Q. How many vessels have a horizontal cabin floor? A. I could not say.

Q. Yet, you attempt to say that this conforms to the ordinary standard type of construction on Puget Sound?

A. Yes. I have been on many such vessels, though I don't remember their names.

Q. Can't you give this Court some idea of the number?

A. I do not have it—most all the little launches have it that way.

Q. I am talking about vessels 80 and 90 feet long with two cabins, that draw five feet of water?

A. Something like one hundred on the Sound—something like that.

Redirect Examination.

(By Mr. BYERS.)

Q. Could this entire equipment, the seat and floor, be taken out and the hull remain the same?

A. Yes.

Q. —freight space installed and the hull be just the same? A. Yes.

Witness excused. [53—18]

TESTIMONY OF BERT S. MURLEY, FOR PETITIONER.

BERT S. MURLEY, a witness called in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. What is your name? A. Bert S. Murley.

Q. What is your position with the Kitsap County Transportation Company?

A. Secretary-treasurer.

Q. What was your position in 1923?

A. General Agent.

Q. At the time you were agent of the vessel—it came within your province—was your work—to see that the vessel had the proper personnel?

A. Yes.

Q. Did this vessel, at that time, on that date, December 7th, 1923, was it manned and equipped in compliance with the certificate of inspection which you had then? A. Yes.

Q. I offer you a copy, or what purports to be a copy, and will ask you to state if you know what this paper is? A. Yes, certificate of inspection.

Q. Was this vessel regularly inspected that year by the United States Inspectors? A. Yes.

Q. Did she pass the inspection? A. Yes.

Q. And it was in the same condition at the time this accident occurred that she was when inspected? A. Yes. [54—19]

(Testimony of Bert S. Murley.)

Mr. BYERS.—We offer this copy of the certificate of inspection in evidence, your Honor.

The COURT.—There is no objection. It may be admitted.

(Marked Petitioner's Exhibit 1.)

Cross-examination.

(By Mr. MARTIN.)

Q. You have been with this company how long, Mr. Murley? A. Since 1916.

Q. And this vessel has been in the same condition, and is now, as with respects to the after-cabin, as when you joined this company?

A. Yes.

Q. Has a center aisle with a raised platform ten inches high on each side? A. Yes.

Q. And with seats flush with this platform?

A. Yes, approximately so.

Q. The space between the chairs is twenty-nine inches?

A. Yes, I would judge it is. I would not say positively.

Q. There isn't room in sitting down in the seats for one person to pass another, is there?

A. No, not without rising.

Q. And a person in getting out of the seat would have to turn sideways and slide out from the seat and step down ten inches?

A. The seat could be turned up. You don't have to slide out of the seat.

Q. But if a person didn't see fit to raise the seat and then step down, they would have to slide out

(Testimony of Bert S. Murley.)

and reach down ten [55—20] inches before getting a firm footing?

A. No, there is room enough to stand up just the same as on a street-car.

Q. Did you ever have any complaints about anyone getting hurt as a result of the narrow space between the seats and the precipitous sides of the aisle? A. No.

Q. Not in June—

Mr. BYERS.—We object to that, your Honor, as not proper cross-examination.

The COURT.—Objection sustained.

Witness excused.

TESTIMONY OF CHARLES E. TAYLOR, FOR PETITIONER.

CHARLES E. TAYLOR, a witness called in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. State your name.

A. Charles E. Taylor.

Q. What is your business, Mr. Taylor?

A. Shipbuilder.

Q. Where is your plant now?

A. Lake Washington Shipyard, at Hoquiam.

Q. And you are operating now, at the present time, a plant? A. Yes.

Q. And you have a large number of men employed there? A. Yes.

(Testimony of Charles E. Taylor.)

Q. Are you acquainted with this type and class of boat, as the gas screw "Suquamish." A. Yes.

Q. I would ask you if the arrangement of the seats is the [56—21] ordinary and usual arrangement and the standard type as used in that vessel? A. So far as I know, it is.

Q. You are pretty well acquainted with vessels of that type? A. Yes.

Q. How long have you been engaged in building ships of this kind and type?

A. Twenty-five years.

Q. I will ask you if the equipment of the seats and the floor and the arrangement of the cabin—is any part of the hull of that ship?

A. No, sir.

Cross-examination.

(By Mr. MARTIN.)

Q. As far as you know, Mr. Taylor, that is the standard type of construction? A. Yes, sir.

Q. How many vessels do you know about?

A. I know about all there is on Puget Sound.

Q. How many vessels on Puget Sound?

A. Well, about ninety plying passenger trade. I would not say how many around Seattle—I know those.

Q. How many?

A. I would not say how many—I think it has been stated here before.

Q. How many of these vessels are equipped with this center aisle and raised platform above the aisle, extending out to each side?

(Testimony of Charles E. Taylor.)

A. I would not say I knew how many. There are a good many.

Q. Well, how many vessels? [57—22]

A. I don't know how many.

Q. You couldn't tell us the name of one vessel equipped in that manner?

A. "Dr. Martin," the "Falcon" and another which I think is called the "Speeder," and the "Chicker"—

Q. How large is the "Chicker"?

A. About the size of the "Suquamish."

Q. How long? I mean the "Suquamish."

A. Around 80 or 90 feet.

Q. Is the "Chicker" that large?

A. I don't know.

Q. On what route did the "Chicker" run?

A. She has run here—I don't know where she is running now.

Q. When did you see her last?

A. I could not tell you that.

Q. Did you build her?

A. No, but I know such a one exists and carries passengers.

Q. When did you have occasion to examine her after-cabin to make a comparison between this vessel and that vessel?

A. I never did examine them.

Q. Well, then, how do you know she is equipped in a like manner?

A. I have seen them both and I know they are boats of that type.

(Testimony of Charles E. Taylor.)

Q. I asked you about the "Chicker"—you saw that condition—this raised platform, ten inches from the floor?

A. Cabin sunken down in the same way—there are raised places in those boats, even in the toilets and different places—where you step upon a platform—in boats of that kind. [58—23]

Q. Now, speaking, definitely, of the condition disclosed on the "Suquamish"—this center aisle, with a platform ten inches high, rows of seats extending one in front of the other, in the women's cabin. What vessel do you know of, you say this is a common type, that is equipped in the same manner and with this platform?

A. I don't know of two just the same—they have some of those features is what I mean.

Q. The fact is, Mr. Taylor, aren't there hundreds of vessels of the passenger type which have horizontal floors in the ladies' cabin?

A. Not always the full width, nearly all of them have platforms some place in them.

Q. But talking about ladies' cabins. Isn't it a fact that on passenger ships, it is the custom to have the flat horizontal floor?

A. On the larger vessels, yes.

Q. Vessels of the type and size of this one?

A. I don't know of any.

Q. If you don't know any constructed that way, what would you say is the number of those constructed as the "Suquamish"?

A. I say most all of them.

(Testimony of Charles E. Taylor.)

Q. Which ones would you point to?

A. Those I mentioned before?

Q. The two or three mentioned? A. Yes.

Q. Now, about the platform being part of the hull. In the first place, the planking in the center aisle—that is right on the beams running across the ship? A. Floor timbers, or beams. [59—24]

Q. Those floor beams are made fast to the ribs?

A. Maybe, nailed in there; fitted to it to support the weight of the floor.

Q. And the flooring put on those columns, tends to keep them in place? A. Yes.

Q. Doesn't it perform the same office as the ceiling? A. In no way.

Q. Adds no strength?

A. No, that is where the people walk—on the floor.

Q. Is it fastened permanently to the vessel?

A. Yes, with nails.

Q. You would not call nails fasteners in that case—? A. Certainly.

Witness excused.

TESTIMONY OF J. L. ANDERSON, FOR PETITIONER.

J. L. ANDERSON, a witness called in behalf of the petitioner, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. BYERS.)

Q. State your name.

(Testimony of J. L. Anderson.)

A. J. L. Anderson.

Q. Where do you live? A. In Seattle.

Q. How long have you lived here?

A. About thirty-eight years.

Q. What is your business, or occupation?

A. Operator of steamboats.

Q. How long have you been an operator of steamboats? A Thirty-eight years. [60—25]

Q. In Seattle and vicinity? A. Yes.

Q. What position do you occupy with the Kitsap Co. Transportation Company?

A. President and manager.

Q. What other companies are you associated with? A. The Anderson Steamboat Company.

Q. Are you acquainted with the gas screw "Suquamish"? A. Yes.

Q. I ask you if you are acquainted with the seating arrangement in the ladies' cabin?

A. Yes.

Q. Is it the standard type of vessels of that character and size? A. Yes, it is.

Q. Have you operated other vessels of the same kind? A. Yes.

Q. Can you give the names of any of them?

A. The "Winifred" and the "Leschi."

Q. Where do you operate those?

A. On Lake Washington.

Q. I would ask you if the seating arrangement equipment is any part of the hull of the vessel?

A. No, sir.

(Testimony of J. L. Anderson.)

Q. By the way, Captain, you have built a good many vessels? A. Yes.

Q. How many about have you constructed about this size and type and larger?

A. Somewhere along about twenty-eight or thirty.

Q. You have been building and operating vessels for thirty-eight [61—26] years? A. Yes.

Cross-examination.

(By Mr. MARTIN.)

Q. Captain Anderson, isn't it true that there are more vessels or as many vessels not constructed as this one was as to the ladies' cabin?

A. No, not exactly.

Q. How many vessels of this general type of passenger ships operating for passenger service?

A. A good many of them operate of that type.

Q. Take vessels of the size of the "Suquamish." Isn't it true that you will find just as many vessels that have horizontal floors in the ladies' cabin as you find with an aisle and raised platform on each side? A. Practically the same.

Q. You find as many one way as you will the other? A. Yes.

Q. You say the floor is not a part of the hull?

A. No, sir.

Q. Well, the planks and board in the flooring are made fast to the floor timbers, aren't they?

A. There are beams in there; we call it false floor.

(Testimony of J. L. Anderson.)

Q. The floor beams are raised how much above the keel?

A. In this case something like, I didn't measure it, fourteen of fifteen inches.

Q. In other words there are beams—how far apart are the beams?

A. I never measured them.

Q. Approximately? [62—27]

A. Well, the standard distance would be 12 or 15 inches.

Q. And these beams go out to the sides and attach to the ribs, or frames, don't they?

A. No, in many cases, they are never fastened.

Q. But in this case, they are fastened to the frames? A. I am not sure.

Q. You heard Mr. Brinton, the man who designed the vessel, testify they were made fast to the frame? A. He may be right.

Q. And if they are made fast to the frames, certainly the floor timbers add strength to the vessel?

A. No, no strength to the vessel.

Q. The ship would be as well off as if it had never had them? A. No.

Q. And you say there are vessels constructed without the keelson? A. Lots of them.

Q. Do you mean to say that timbers placed any distance above the keel, made fast, securely on each side, do not strengthen the vessel by making the ribs more rigid? A. No.

Q. What about the deck beams?

A. That is an entirely different proposition.

(Testimony of J. L. Anderson.)

Q. Well, the flooring is made fast to the timbers, isn't it? A. I am not sure it is.

Witness excused.

Petitioner rests. [63—28]

TESTIMONY OF CLYDE M. MOSES, FOR CLAIMANT.

CLYDE M. MOSES, a witness called in behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. State your full name.

A. Clyde M. Moses.

Q. Your mother, Mrs. Moses, was the person injured on board this vessel? A. Yes.

Q. What was her name? A. Ella J. Harvey.

Q. Were you with Mrs. Harvey at the time of this accident? A. I was.

Q. How old was Mrs. Harvey?

A. She was seventy-three years old.

Q. She was stopping with you here in Seattle, on a visit? A. Yes, she was.

Q. What was the date of this accident?

A. The 7th day of December, 1923.

Q. How was Mrs. Harvey dressed?

A. She had on a serge skirt with a black silk blouse and heavy top-coat—a long coat.

Q. How far down on her person would the coat come?

(Testimony of Clyde M. Moses.)

A. Nearly to the bottom of her skirt which was about four inches or five inches from the floor.

Q. You went with her on board the "Suquamish"? A. I did.

Q. And you paid fares as passengers?

A. Yes.

Q. To what point were you going? [64—29]

A. We were bound for Manitou Beach.

Q. And your destination was—?

A. Manitou Beach.

Q. Did you have occasion to go down into the ladies' cabin on the voyage over? A. Yes.

Q. And took your seats, did you? A. Yes.

Q. Describe the arrangement of the seats with reference to the center aisle.

A. Well, it was very similar to the seats on a street-car with a platform on either side of the aisle.

Q. And you and your mother entered these seats?

A. We did.

Q. What would you say is the distance between the seats?

A. Between the rows of seats? Well, I don't know just how to give the dimensions but I don't know that our knees touched the chair in front; but perhaps mother's did; she was taller than I.

Q. Did you notice that there was room to pass in front of your mother, going in or out?

A. There was not.

Q. Did you notice?

A. Yes, I did, especially.

(Testimony of Clyde M. Moses.)

Q. Where did you sit and where did your mother sit in these seats?

A. Mother sat next to the outside and I sat on the inside near the window.

Q. How many seats were there from the aisle over to the side of the vessel? [65—30]

A. I think just two.

Q. Your seat was near the window and your mother's near the aisle? A. Yes.

Q. Did you notice when you entered whether your mother's garment, her coat and skirt, would come down over the edge of this platform so as to hide the platform from view?

A. Yes, I think they would. Because of the closeness of the seats, the skirt came out over the edge of the platform.

Q. Did you have occasion to look?

A. I didn't have occasion to look but I thought of getting out of the seat but it meant for my mother to get out first—meant for her to step down for me to pass her.

Q. And you didn't attempt to make that change?

A. No.

Q. Will you please tell to the Court, Mrs. Moses, what you know of the injury to your mother and how she was hurt? Tell how it happened.

A. Well, she just fell.

Q. How did she fall? A. Sideways, of course.

Q. What was she doing when she fell—what did she attempt to do?

A. She attempted to leave her seat.

(Testimony of Clyde M. Moses.)

Q. How far had the vessel gone when your mother got hurt?

A. We had just reached the dock at Manitou Beach—were about ready to get out of our seats.

Q. What sort of passage had you had coming over—was there any movement of the vessel?

A. It was a bright, pretty day with some wind and the boat did [66—31] roll a little.

Q. Was there any movement of the vessel as it lay alongside the wharf as the passengers were preparing to go ashore?

A. The natural motion of the vessel bringing to tie up to let the passengers out.

Q. Tell what you saw from then on.

A. Well, the noise of the engines prevented me from hearing anything until I saw mother on the floor and her head nearly struck the edge of the opposite platform—just lacked a fraction of an inch.

Q. Did you see her fall?

A. Not actually fall.

Q. Did you see her attempt to rise?

A. I don't think so. I was looking out the window and I saw her on the floor in that aisle when I turned around.

Mr. MARTIN.—Your Honor, I think to shorten this matter and save time, the best way would be to go right through the case.

The COURT.—I am not familiar with the statutes here. Suppose the petition for limitation of

(Testimony of Clyde M. Moses.)

liability is denied, will the case be tried here on its merits?

Mr. MARTIN.—I understand the practice to be that if the petition for limitation of liability fails, the case is dismissed and we are permitted to proceed with our cause of action in the state courts.

Q. Mrs. Moses, what did you do after Mrs. Harvey had fallen into the aisle—she was in the aisle, wasn't she?

A. Yes. As soon as the boat was tied up, a couple of [67—32] passengers carried her upstairs and she was taken off the upper deck into the little waiting-room on the dock and we had to wait until Dr. Shepard came from Winslow and we got a wagon and sent to the school for a stretcher, which was just a bed and due to the defective dock, we were not able to drive the horse down to the waiting-room, so the men came and carried the bed to the Manitou Beach store and owing to the width of the bed, it could not be carried into the store and we had to put it on the side porch until the boat returned at 4:45.

Q. And she came back on the same boat?

A. Yes.

Q. She was taken aboard? A. Yes.

Q. On an improvised stretcher? A. Yes.

Q. To Seattle? A. Yes.

Q. And when you reached Seattle, she was taken to a hospital? A. Yes.

Q. How many weeks was she there?

A. Twenty days.

(Testimony of Clyde M. Moses.)

Q. And then from there where was she taken?

A. To my home on Everett Avenue.

Q. And she remained there how long?

A. Until the 30th day of last July.

Q. Then where did she go?

A. To Wisconsin.

Q. Is she there now? A. She is. [68—33]

Q. During that time, how long was your mother confined to her bed after reaching your home—after leaving the hospital?

A. Well, I think she was in the cast six weeks and I think it was more than a month or six weeks before she could sit up at all. She had to be lifted from her bed and put back.

Q. Do you know the extent of her injuries?

A. Well, she had a broken hip and wrist—

Q. Had she recovered from those breaks when she left your home in July, 1924?

A. Her doctor is here, if you wish to ask him that question.

Q. Well, Mrs. Moses, from what you saw, was she able to go without the aid of crutches?

A. No, she was still on crutches.

Q. Did you pay out any money on her behalf for hospital, physician's and nursing bills? A. Yes.

Q. What moneys were paid out—I will hand you these bills and I will ask you to pick them out and refer to them and hand them to me. (Hands witness a number of bills.)

A. Here is a bill that was paid to the Seattle General Hospital for $187.00—

(Testimony of Clyde M. Moses.)

Mr. BYERS.—The deposition of Mrs. Harvey, your Honor, shows the sum that was paid.

Q. Mrs. Moses, have you ever been aboard this ship before? A. Yes, I had.

Q. How many times?

A. About twice.

Q. How long before were those two trips?

A. Well, the week before and then, perhaps, it was four [69—34] months before that, the first time.

Q. Did the vessel appear to be in the same condition as to the cabin then, on the occasion of your mother's injuries, as it was on the two previous occasions? A. Yes.

Q. With respect to seating conditions?

A. Yes.

Q. Had Mrs. Harvey been on board this vessel before? A. No, sir.

Q. Had she been with you at all times in your home from the time she came from Wisconsin?

A. Yes.

Q. And you would know, positively, that she had not been on that vessel?

A. Yes, we had planned our trip in order to take advantage of the extra service of Tuesdays and Saturdays.

Q. You would say, positively, that she had never been on this boat before? A. No, she had not.

Cross-examination.

(By Mr. BYERS.)

Q. Mrs. Moses, when you went in, you went in

(Testimony of Clyde M. Moses.)

first and sat down next to the window and your mother followed and sat on the outer seat, and the seats were arranged in pairs? A. Yes.

Q. When you went into these seats, you, necessarily, had to step over and must have known there was a step there when you stepped up?

A. Perhaps.

Q. Now, the aisle between the steps is almost exactly like [70—35] the aisle between the steps leading up to the witness' chair and the step for the jury-box here, only the aisle is a little wider? (Indicating.) A. Yes, I think so.

Q. And Mrs. Harvey had simply to look across to see a step on the other side?

A. If she had looked.

Q. And she could have looked if she wanted to?

A. She was not anticipating this fall.

Q. She could have seen this step—there was nothing to prevent her from looking—the step was in plain sight, was it not? A. I suppose.

Q. Also, the step she took to get to the chair upon which she was seated was in plain sight when she took the chair? A. I presume so.

Witness excused.

Mr. MARTIN.—Your Honor, we have the deposition of Mrs. Ella J. Harvey here in court and we would like to read it.

Mr. BYERS.—We will consent to this deposition being read in court if we are permitted to make the same objections as though the witness

were here in court and testifying in the witness-stand.

The COURT.—It may be so read.

(Mr. Martin reads deposition of Ella J. Harvey, as follows:) [71—36]

[Title of Court and Cause.]

DEPOSITION OF ELLA J. HARVEY.

BE IT REMEMBERED that heretofore and on, to wit, the ninth day of July, 1925, at two o'clock P. M., at 2207 Everett Avenue North, Seattle, Washington, before me, a notary public in and for the State of Washington, there appeared:

Mr. Herman S. Frye, an attorney at law, on behalf of Ella J. Harvey; and

Mr. Alpheus Byers, an attorney at law, on behalf of petitioner above named.

Also at the same time and place appeared Ella J. Harvey, who was duly sworn and gave her deposition as appears on the pages following; the taking of said deposition being in accordance with, and pursuant to, stipulation entered into by and between the above-named attorneys as follows:

> It is hereby stipulated between the parties to the above-entitled action that the deposition of Ella J. Harvey may be taken on this the ninth day of July, 1925, on oral interrogatories propounded to the witness. All objections as to the time, place and manner of taking said deposition are hereby waived. All

(Deposition of Ella J. Harvey.)

objections as to materiality, relevancy, and competency of the questions and answers are hereby reserved and may be made at the trial of the above-entitled action. The signature of the witness is hereby waived. [72—37]

ELLA J. HARVEY, produced as a witness in her own behalf, having been first duly sworn, testified as follows:

Direct Examination.

(By Mr. FRYE.)

Q. Your name is Ella J. Harvey?

A. Yes, sir.

Q. How old are you, Mrs. Harvey?

A. Seventy-four.

Q. On or about the 17th day of December, 1923, were you a passenger on the steamer "Suquamish"? A. I was.

Q. You paid your fare, did you? A. I did.

Q. Where were you going?

A. Manitou Beach.

Q. Were you starting to Manitou Beach or were you returning?

A. I was going to Manitou Beach.

Q. And the boat was lying at the wharf at Seattle? A. Yes, so we could get on.

Q. You went aboard the boat, did you?

A. I did.

Q. Where did you go?

A. I went down two or three pair of stairs—narrow stairs, down into the passenger deck, I suppose it was.

(Deposition of Ella J. Harvey.)

Q. There were accommodations for passengers there?

A. There were seats there for them to climb up onto.

Q. Did you take a seat there? A. I did.

Q. Now, those seats are raised, are they not, above the— [73—38] about eight or ten inches above the floor? A. Yes, sir, they were.

Q. You stepped up and took your seat?

A. Yes, I did.

Q. What occurred after that, Mrs. Harvey?

A. Well, we rode over to the Beach—Manitou. The car started to stop. I stood up to get off. I didn't suppose you know—I had been on other boats that were all on one floor. Instead of that I fell.

Q. You stepped off the ledge?

A. I was going to step off. My feet didn't touch the floor. I went sideways.

Q. Did you notice this dropping off between the—

A. No, I didn't notice it. I had traveled on other boats across there. It was all on one floor. I never dreamed there was a place to break my neck there.

Q. You fell to the floor, did you?

A. I certainly did.

Q. Did you suffer any injury by that fall?

A. I had a broken wrist and a broken hip.

Q. Are you still suffering from those injuries?

A. I am.

(Deposition of Ella J. Harvey.)

Q. What have you expended, Mrs. Harvey, in nurse hire and doctor bills?

A. Didn't you get an account of that, Mr. Frye?

Q. Yes, I have it. I just wanted to get it in the deposition.

A. Since that was made out about a year ago or such a matter, I have paid out for more help.

Q. On September 4, 1924, I received a statement in which [74—39] up to that time you had expended the following items: Seattle General Hospital, $561. Is that correct at that time?

A. That was correct.

Q. Dr. Dawson and Dr. James Burch, $550. Is that correct? A. Yes, sir.

Q. Nurse hire, $726; ambulance, $11.

A. Yes.

Q. Wheel-chair, $17.50; medicine, $25. That made a total expense at that time of $1,890. Is that correct statement of what you spent at that time? A. I think so.

Q. That was September 4, 1924. What has been your expenses since that time?

A. I spent $325.

Q. Since September 4, 1924?

Mrs. MOSES.—That is including this.

A. That is besides. I don't mean I have paid that since.

Q. Since September 4 what other items of expense have been paid making up this $325?

A. That $325 is for nursing and helping me to get around when I can't wait on myself since.

(Deposition of Ella J. Harvey.)

Q. You have had a nurse right along?

A. Yes. I haven't had very much more medicine or anything. I have just been stiff; couldn't get around and wait on myself.

Q. That makes approximately $2,215.50 that you have actually expended for doctors, medicines, nurse hire, and hospital bills since your injury?

A. Yes, sir. [75—40]

Q. Did anyone warn you of any danger there might be? A. On that boat?

Q. On the boat? A. Certainly not.

Q. Were there any signs of any kind indicating there might be any danger?

A. I didn't see any.

Cross-examination.

(By Mr. BYERS.)

Q. Who is your nurse?

A. I have had different nurses.

Q. Give us the names of them.

A. One is Mrs. Lossius.

Q. How much did you pay her?

A. I paid her—what was it—six dollars a day and her board—was that it (apparently asking Mrs. Moses)?

Mr. BYERS.—You must not ask her.

The WITNESS.—Well, I am afraid I haven't got it itemized right up to date.

Q. Well, can you give us approximately the amount? A. My checks will show it.

Mr. FRYE.—I have a little statement she made

(Deposition of Ella J. Harvey.)

to me at one time. Perhaps she can refresh her memory.

Mr. BYERS.—Sure.

(Mr. Frye hands paper to Mr. Byers.)

Q. You have here Miss Tilden $185. That is a nurse, is it?

A. Miss Tedda. Mrs. Michelbust. Perhaps I haven't got—

Q. Yes, Mrs. Michelbust. Was that at the hospital? [76—41] A. No, that was here.

Q. That was here at the house. And Mrs.—

A. Gilda.

Q. I don't see that here.

Mr. FRYE.—Was that since September 4?

Q. Was that since March 29, 1924? Was Miss Tilda since March 29, 1924?

A. That is Miss Tedda.

Q. You don't have her here at all. Was that since March 1924?

A. I guess she was here until about the first of June.

Q. 1924? A. Yes.

Q. How much did you pay her?

A. $25 a week.

Q. How many weeks did you have her here?

A. I would have to look at my check-book to see.

Q. When you went into this boat were you alone? A. I was not.

Q. Who was with you?

A. My daughter, Mrs. Moses.

(Deposition of Ella J. Harvey.)

Q. Mrs. Moses, your daughter, was with you. You stepped up a step? A. I certainly did.

Q. And then took a seat. There was nothing to prevent you from seeing that you stepped up?

A. Nothing at all.

Q. In fact you knew you stepped up?

A. Certainly.

Q. There was nothing to prevent you from seeing the step [77—42] when you went to get up?

A. From seeing?

Q. Yes, from seeing that you had to step down to the floor when you got up.

A. I sat right on the edge of the seat.

Q. There was nothing to prevent you from seeing the floor, was there?

A. Unless it was my clothes—my skirt.

Q. Did they prevent you from seeing the floor?

A. Well, I don't know how to answer you.

Q. Just tell me the truth, that is all, Mrs. Harvey. Did your clothes prevent you from seeing the floor?

A. I can't remember just how I sat, but I sat on the edge of the seat.

Q. I will return to my original question. Was there anything to prevent you from seeing the floor?

A. Nothing but carelessness maybe that I looked up instead of down.

Q. But you could have looked down if you had wanted to, couldn't you?

(Deposition of Ella J. Harvey.)

A. I suppose I could, I was looking to the door how to get out.

Q. Now, all the rest of the people sat on seats just the same as you, didn't they?

A. I suppose they did. I didn't look.

Q. You were there and looked and saw them?

A. There were very few there that day.

Q. So far as you know that is just the way the passenger cabin had always been. That is, there was nothing newly constructed that you saw, was there? [78—43]

A. I never was on there before.

Q. It had the appearance of being the same that the passengers' cabin had always been, didn't it?

A. Well, as far as I know.

Q. Was it in the daytime? A. Yes, sir.

Q. How long had it been from the time you got on until you reached the Beach in point of hours and minutes—do you remember?

A. Oh, I think about an hour.

Q. About an hour to make the trip?

A. I think so.

Q. You had been sitting in that chair all that hour? A. Yes, sir.

Q. Had you ever gotten up again— A. No.

Q. —before you finally got up?

A. I did not.

Q. When you were hurt was when you got up and were about to leave the boat? A. Yes, sir.

Q. That was the end of your trip? A. Yes, sir.

(Deposition of Ella J. Harvey.)

Q. Now, during all the time that you were going on that trip, Mrs. Harvey, was there anything to prevent you from looking down at the floor and seeing just how that step stepped off?

A. I don't know as there was.

Q. As a matter of fact, you did see it, didn't you?

A. I don't think I did. I don't think I even noticed it. [79—44]

Q. Didn't you notice it when you stepped up?

A. Certainly. Certainly I knew that.

Q. Well, when you noticed that you stepped up you would know that you would have to step down when you got off, wouldn't you?

A. I presume so.

Q. As a matter of fact, Mrs. Harvey, you just like a great many people—you just forgot—that is the solution, isn't it?

A. Well, I had not been used to riding on such a boat. I expected it would be on a level.

Q. You expected it would be on a level?

A. I expected it to be on a level with the water too.

Q. Where do you live, Mrs. Harvey?

A. My home is in Wisconsin.

Q. You have been around boats a great deal in your lifetime?

A. But very little. Last summer my daughter lived acros the Sound.

Q. Before you came out here?

A. I didn't know anything about boats.

(Deposition of Ella J. Harvey.)

Redirect Examination.

(By Mr. FRYE.)

Q. Had you made the trip to Manitou on other boats? A. Yes, sir, on the "Vashon."

Q. Do you know whether or not that belongs to the Kitsap County Transportation Company?

A. I do not.

Q. Now, that makes a trip from Seattle to Manitou? A. Yes, sir. [80—45]

Q. Had you ever been aboard this boat before?

A. No, sir.

Q. Now, on the "Vashon" the seating accommodations are all on the level? A. All on the level.

Mr. BYERS.—I object to this because it is immaterial and incompetent. But I suppose we are reserving these objections.

Mr. FRYE.—Yes.

Mr. BYERS.—That will be all right, then.

Q. You had no reason to think that this was not on the level? A. No.

Mr. BYERS.—I think that is argumentative and suggestive.

Mr. FRYE.—I think perhaps it is.

(Deposition concluded.) [81—46]

State of Washington,
County of King,—ss.

I, Arthur Royse, a notary public in and for the State of Washington, do hereby certify:

That the above deposition was taken before me and reduced to writing by myself at 2207 Everett Avenue North, Seattle, in said county, on the ninth

(Testimony of Dr. Lewis R. Dawson.)

day of July, 1925, at two o'clock P. M., in pursuance of stipulation set out on the first page hereof.

That the above-named witness, before examination, was sworn to testify the truth, the whole truth, and nothing but the truth; and

That the signature of the witness to the deposition was expressly waived.

WITNESS my hand and official seal this eighth day of September, 1925.

[Seal] (Signed) ARTHUR ROYSE,
Notary Public in and for the State of Washington, Residing in Seattle. [82—47]

TESTIMONY OF DR. LEWIS R. DAWSON, FOR CLAIMANT.

DR. LEWIS R. DAWSON, a witness called in behalf of the claimant, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. MARTIN.)

Q. State your full name, Doctor.

A. Lewis R. Dawson.

Q. You are duly licensed in the practice of medicine? A. Yes.

Q. How many years have you been in Seattle?

A. Forty years.

Q. And you attended Ella J. Harvey on the occasion of the accident referred to here? A. Yes.

Q. Are you acquainted with her daughter, Mrs. Moses? A. Yes.

Q. Doctor, the record shows that this accident

(Testimony of Dr. Lewis R. Dawson.)

occurred on the 17th day of December, 1923. How soon do you recall that you attended Mrs. Harvey?

A. Well, they phoned me over long distance in the afternoon that they were coming over on the boat at five o'clock and to meet them with an ambulance and be prepared to take them to the hospital, and which I did.

Q. And as to the examination—what did you conclude as to her then condition of injury?

A. She was suffering pretty severely from pain and evidenced a fracture of the left thigh and the left arm just above the wrist; I made her as comfortable as I could that night and the next morning I examined her injuries and treated her. We also had an X-ray made.

Q. And did the X-ray confirm the diagnosis as to the fracture [83—48] in the hip joint and the arm?

A. Yes, there was a decided fracture in the hip joint—intracapsular fracture of the bones of the arm, which was very bad—

Q. Do you describe those two fractures, the ones —one to the hip and one to the wrist, as serious?

A. A fracture to the hip joint is always very serious as frequently it is impossible to secure a union inside of the capsular after an injury in that way and this was an aggravated case— a lady 74 years of age, the older, of course, the worse. This sort of injury is common to elderly people.

Q. How long did you continue to treat Mrs. Harvey?

(Testimony of Dr. Lewis R. Dawson.)

A. Practically until she went back home last summer, she was under my care—some time in June 1925.

Q. And during that time, do you recall how long Mrs. Harvey was compelled to remain in bed?

A. I looked up my notes to-day and found that she left the hospital on the 20th day after the injury; at the end of the month, I removed the cast dressing from the left arm for the first time and at the end of eight weeks, cut off the casts from her body and legs which were completely in a cast and which remained practically eight weeks and, following that, I would not be sure but my recollection is that one month from the day the cast was removed, was when she first sat up in a chair. It was four months that she was in bed before she was able to sit up.

Q. How long, Doctor, was it before she was able to leave her bed and be about on crutches or in an invalid's chair?

A. Well, she was unable to stand on her feet and her arm [84—49] being injured, she could not use crutches because her left arm was very badly fractured so that she was unable to use it. If her arm had not been hurt, she probably could have gotten along better. She was unable to stand on her feet or bear her weight even with support.

Q. Have you those notes with you, Doctor?

A. Yes. (Takes notes from pocket.) (Reads.) The cast was taken from her arm on January 6th, one day less than four weeks; on January 31st,

(Testimony of Dr. Lewis R. Dawson.)

six weeks, I removed the cast from her body; on April 6th I noted that she sat up in a chair and moved her left leg at the hip joint, and at which time I noted a muscular weakness and stiffness.

Q. Did you get a good union of the hip joint?

A. It was slightly impacted but with the support of the cast, I was able to unite this joint with a slight deformity; the angle of the upper end was a little bit changed. There was very little pain from the hip joint—not as much as in the

Q. Have you a record of when she was able to

arm.

go about on crutches?

A. On the 13th of April, she was sitting up in a wheel-chair and had stood on her feet for a moment.

Q. Do you remember, Doctor, that she was able to go about on crutches before she left to any extent at all?

A. Well, by somebody steadying her, she was able to get across the room from her bed to a chair; that was her condition when she left Seattle; just *bearly* able, with assistance, to get to the automobile when she left.

Q. Now, that was in July, 1925. You haven't seen her since? [85—50] A. No.

Q. Was that injury, both injuries, painful—of a painful character and would you say she suffered any pain?

A. She suffered a great deal of pain in her back from the fall and also in the arm and also from

(Testimony of Dr. Lewis R. Dawson.)

the prolonged immobilization of the legs in the cast which was necessary to secure a union in the hip joint.

Q. How long did this condition of pain and suffering continue up until the time it practically disappeared?

A. She was unable to move her limbs without pain for a much longer period. She was gritty and would try to move them although it pained her and she could not move without pain.

Q. Would you say, from the nature of her injuries, that she was suffering pain to any extent when she left here? A. I think she did.

Q. You think the pain continued more or less from December, 1923, down to July, 1925?

A. Yes.

Q. Would you say, Doctor, that her leg, the injured leg, was any shorter, or out of position, or whether she would have the same freedom of that leg as she would have had, or had, before the injury?

A. There was a slight degree of shortening because at the point of break, there was a little bend this way (indicating) instead of an angle like this and the break here in the bone bent up which caused a little shortness in length. However, so little, I don't think would make much difference, or annoyance in the use of her leg. If she were well in every other way and had complete use of [86—51] her limbs otherwise, I don't think this

(Testimony of Dr. Lewis R. Dawson.)

fracture of the hip joint now would cause her any inconvenience, if any.

Q. You think she could walk about as well as ever? A. Yes.

Q. How about the use of her wrist?

A. That will never be completely restored because of the splintering of the bones being such as to make it impossible to secure a perfect union; the joint is stiffened and the whole hand stiffened and a little bit misplaced.

Q. Her hand is partially and permanently injured? A. Yes.

Q. Do you recall in the payment of your bill, the amount?

A. $550.00, I think, besides other incidentals which brought the entire bill to $586.00.

Q. And, Doctor, that is the usual and reasonable charge for that service, covering the period of time you served her? A. I think so.

Q. And you gave her more or less constant attention during that period?

A. For the first couple of months, daily, and sometimes I attended her twice a day when she suffered so severely from the pain in her back and throughout her limbs and arm.

Q. And that would be the usual and reasonable charge as is current among the regular physicians in Seattle? A. Yes, I think so.

Witness excused. [87—52]

Mr. FRYE.—Your Honor, I would like to recall Mrs. Moses for a few moments.

The COURT.—Very well.

TESTIMONY OF MRS. CLYDE M. MOSES, FOR PETITIONER (RECALLED).

MRS. CLYDE M. MOSES, recalled on behalf of the petitioner.

Direct Examination.

(By Mr. FRYE.)

Q. Mrs. Moses, do you remember what you paid the Seattle General Hospital?

A. About $187.00, I think.

Q. And that was the hospital charge, alone?

A. Yes, then we paid the nurses besides that.

Q. I will hand you this statement from these items you paid out and will ask you what did you pay the Seattle General Hospital and the nurses furnished by them from December 7th to the 27th?

A. $439.00 including the day and night nurses and their board and the use of the operating-room and, I think, the X-rays.

Q. What did you expend for—

Mr. BYERS.—Your Honor, please, we think this is all leading.

—what did you pay to Dr. Shepherd?

A. $10.00 for his services.

Q. Who were the nurses who attended your mother?

A. Well, we had the Seattle General nurses, trained nurses, for just a short time. Miss Tedder was the last trained nurse we had; after that, we had practical nurses.

(Testimony of Mrs. Clyde M. Moses.)

Q. Do you remember what amounts were paid to Miss Tedder?

A. $185.00 for Miss Tedder. [88—53]

Q. What other nurses did you have?

A. Well, we had one practical nurse and I paid her $200.00. The nurse who came home with mother from the hospital, who was at the house for a couple of days, and I paid her $20.50. Miss Campbell and Miss Vernon were the night nurses. Miss Campbell charged $5.50 per day and Miss Vernon charged $5.00 per day.

Q. Were you compelled to buy a wheel-chair for your mother? A. We rented one.

Q. What did you pay for it?

A. $1.50 per week and the transfer charges.

Q. Do you remember what it all amounted to?

A. I can't remember the figures now. It shows on the vouchers which you have.

Q. What did you say you spent for an ambulance?

A. $11.00, $5.00 to and $6.00 from the hospital to our house.

Q. Now, after March 29th, 1924, what expense were you to on account of your mother in nurse hire and care?

A. Up to August 10th, up to the time she left; I think it was $325.00. We had a practical nurse at $25.00 per week for, I think it must have been —but you have the items there.

Q. And you paid $325.00 for that? A. Yes.

(Testimony of Mrs. Clyde M. Moses.)

Q. What other expense were you to besides doctors, the Seattle General Hospital, nurses—any expense for medicines? A. Something like $25.00.

Q. That makes practically a total, as per these receipts, of about $2,215.50? [89—54]

A. Yes, I think so.

The COURT.—This is the same as Mrs. Harvey testified to.

Cross-examination.

(By Mr. BYERS.)

Q. Did you pay these bills or did your mother pay them? A. My mother paid them.

Q. Is there anything in there charged for your own services? A. No.

Witness excused.

Claimant rests.

Mr. BYERS.—Your Honor, we wish to move that this claim be dismissed because of the fact that there is no showing here at all of any negligence or anything upon which the petitioner is bound to respond in damages as far as the claimant is concerned. I think that the testimony here shows conclusively that everything was in plain sight and as she says, she could have seen the step but for her own carelessness. I don't see how anything could be made stronger than that. Those are the words of the claimant herself and I submit that without further argument, this claim should be dismissed.

Mr. MARTIN.—If your Honor please, under the statutes, it is the duty of the owner of a vessel to furnish a seaworthy vessel and to be properly

equipped and the right to limit is denied if the owners fail in this regard. (Further argument and citations.) All to the effect that, in view of the very high duty that the steamship companies owe to their passengers, that the question of negligence is a proper one [90—55] for the jury.

The COURT.—There could be the situation of a vessel being in a seaworthy condition and the fault be with the injured person.

Mr. MARTIN.—I don't think so, your Honor, if the person is hurt in the manner as the injury occurred here. It is our contention that the petition for limitation of liability should be denied. And further, your Honor, I think the burden here is on petitioner to show that this ship was not unseaworthy.

The COURT.—Yes.

Mr. BYERS.—Yes, your Honor, the burden is on the petitioner and, according to my ideas, that burden has not only been assumed, but established. We think that according to the witnesses and the testimony given, that the fact has been established that the fault was not ours.

The COURT.—I will take the matter under advisement.

Mr. BYERS.—Your Honor, must we now enter the balance of our testimony?

The COURT.—I assumed this was the trial of the case. However, you may proceed. I will deny the motion right here.

TESTIMONY OF PHILIP D. MACBRIDE, FOR PETITIONER (RECALLED.)

PHILIP D. MACBRIDE, recalled on behalf of the petitioner.

Direct Examination.

Mr. BYERS.—Q. I would like to ask you, Mr. Macbride, if this step is in plain sight of anyone going into the cabin? A. Entirely so.

Q. In order to take a seat, would the person have to make the [91—56] step that they retrace upon leaving the seat? A. Yes.

Q. Is the cabin well lighted, with full windows down both sides? A. Yes.

Q. Were these seats, themselves, in good order on the date of this accident? A. Yes.

Q. Is this seating arrangement usual in this class of vessels?

A. Yes—I think, about as Mr. Coolidge testified—

Mr. MARTIN.—We object, your Honor, to this witness testifying as to other vessels unless this witness knows the width of seats in other vessels.

—as customarily used. In some carriers,—the distance between the seats are practically uniform. All Puget Sound boats are about the same as in theatres.

Q. Did the chairs have arms by which to steady anyone getting up or down?

A. Yes, the arm of the chair is part of the casting from which the seat is made.

(Testimony of Philip D. Macbride.)

Q. How are the seats fastened to the raised platform? A. They are bolted down.

Q. Are they rigid? A. Entirely so.

Q. Now, compare it with the jurors' seats—the back seat of the jurors' box—and how does it compare with this seat? (Indicating.)

A. The seat is, of course, entirely different—it is a metal seat fastened to the floor. The height from the [92—57] gangway or aisle to the seat is considerably less than the height of the jurors'—a little lower than the height of the front row of the jury-box.

Mr. BYERS.—Your Honor, we offer for identification as Petitioner's Exhibit 2, this photograph.

Q. Is that a photograph of the cabin taken from the rear part of the cabin looking forward on the "Suquamish"? A. It is.

Mr. BYERS.—Your Honor, we offer this in evidence.

Mr. MARTIN.—There is no objection.

The COURT.—It may be admitted.

Cross-examination.

(By Mr. MARTIN.)

Q. Referring to this photograph which has just been introduced in evidence as Petitioner's Exhibit 2, there is no warning of any kind, no guard-rail, nothing to attract a person's attention to that raised platform?

A. It shows for itself, Mr. Martin.

Q. No such sign is exhibited?

A. No,—no sign other than the steps.

(Testimony of Philip D. Macbride.)

Q. No warning sign posted up there to be careful, step up or down, no admonition to passengers?

A. No, sir.

Q. But such signs could be posted there in various places about the room, couldn't they?

A. It is possible but it would not be as good a notice as the thing itself.

Q. The arms of the chairs in this photograph are shorter than these in the jury-box? [93—58]

A. They are the standard theatre seat arms.

Q. Shorter?

A. About the same as that arm but the support underneath comes up straight from the fastening on the floor so the arm extends beyond the support.

Redirect Examination.

(By Mr. BYERS.)

Q. There was no notice on the stairs to "step up" or "step down"? A. No.

Witness excused.

TESTIMONY OF J. L. ANDERSON, FOR PETITIONER (RECALLED).

J. L. ANDERSON, recalled as a witness on behalf of the petitioner.

Direct Examination.

(By Mr. BYERS.)

Q. This step, Captain Anderson, from the center aisle up to the small raised platform in which the chairs are arranged, about how high is it?

A. Ten inches.

(Testimony of J. L. Anderson.)

Q. Can that be seen by any passengers using the aisle?

A. Yes, they cannot help but see it.

Q. Is the cabin at all times well lighted?

A. Yes.

Witness excused. [94—59]

TESTIMONY OF FREDERICK S. BRINTON, FOR PETITIONER (RECALLED).

FREDERICK S. BRINTON, recalled as a witness on behalf of the petitioner.

Direct Examination.

(By Mr. BYERS.)

Q. You are a qualified Naval Architect?

A. I am.

Q. Mr. Brinton, explain to the Court the reasons why these chairs are placed upon this raised platform.

A. Well, the side of the boat comes in and if you didn't raise the platform you would not be able to get the width on the floor line and that would do away with half of the seating capacity. Another reason is so that the passengers can see out of the windows.

Q. In this class of vessels, is it customary to place any warning that a passenger, or prospective passenger, should "step up"?

Mr. MARTIN.—We object, your Honor, on the ground, first, that this witness is not qualified to answer and in the next place, it is a matter of law whether they should do that, or the situation re-

(Testimony of Frederick S. Brinton.)

quires it and whether it "is customary" is not proper.

The COURT.—I will make this ruling. Objection overruled; for counsel, exception noted, if the testimony is immaterial—the Court makes the decision.

A. No.

Cross-examination.

(By Mr. MARTIN.)

Q. You say this raised deck gives more seating capacity and [95—60] is raised in order to go out on a horizontal plane out to the side of the ship?

A. Yes.

Q. (Indicating.) What would have prevented boarding over here, this space, and having level decks?

A. You wouldn't have the head room.

Q. Then why not, if you constructed this vessel, why not give six inches raise on your deck?

A. On account of stability—you want to keep the center low.

Q. You say it is not customary to put up warning signs; on how many boats are they on?

A. I never saw any warning signs to step up—we have all signs made for vessels we design, and see that they are put up.

Q. But how many vessels on the Sound have you examined as to that condition?

A. I have never examined any of them for that particular purpose but I have been on a great many and I never saw it.

Witness excused.

Petitioner rests.

Mr. BYERS.—We renew our motion, your Honor, that this claim be dismissed.

Mr. MARTIN.—And we renew our request, your Honor, that the petition for limitation of liability be denied.

The COURT.—I will take this case under advisement. [96—61]

[Title of Court and Cause.]

STIPULATION AS TO TRANSCRIPT OF EVIDENCE.

It is hereby stipulated by and between the Kitsap County Transportation Company, petitioner, through its proctors, Byers & Byers, and Ella J. Harvey, claimant, through Herman S. Frye and Winter S. Martin, that the foregoing statement, report and transcript of the trial of the above-entitled cause is a full, true, complete and properly prepared statement, report and transcript of all the evidence introduced upon the trial of said cause at the hearing on the merits in the above-entitled court at Seattle, King County, Washington, on the 16th day of March, 1926, before the Hon. George M. Bourquin, one of the Judges of said court, together with all objections and exceptions made and taken to the admission or exclusion of evidence and all motions and rulings by the court thereon made upon said trial, together with Petitioner's Exhibit No. 1 (Certificate of Inspection), and Petitioner's Exhibit No. 2 (Photograph), and

that no certificate of the trial Judge to said statement, report and transcript shall be required.

Dated at Seattle, Washington, June 2d, 1926. [97]

KITSAP COUNTY TRANSPORTATION COMPANY.

By BYERS & BYERS,
JOHN A. HOMER,
Its Proctors.

HERMAN S. FRYE,
WINTER S. MARTIN,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Filed Jun. 2, 1926. [98]

[Title of Court and Cause.]

PRAECIPE FOR APOSTLES ON APPEAL.

To Ed. Lakin, Clerk of the United States District Court:

Please prepare the record on appeal and transmit to the Circuit Court of Appeals the following:

1. Caption exhibiting proper style of the court and title of the cause.
2. Statement showing time of commencement of suit, etc.
3. Petition for limitation of liability of the Kitsap County Transportation Company.
4. Answer to petition for limitation of liability and claim for damages for personal injuries of Ella J. Harvey.
5. Objections of petitioner to claim of Ella J. Harvey.

6. Memorandum decision of Bourquin, Judge.
7. Petitioner's petition for rehearing and for new trial.
8. Minute entry showing denial of petition for rehearing and for new trial.
9. Final decree of Court.
10. Exceptions of petitioner. [99]
11. Notice of appeal with admission of service.
12. Bond on appeal with notations of approval.
13. Transcript of trial, proceedings and evidence.
14. Stipulation as to evidence.
15. Assignments of error with admission of service.
16. Stipulation as to record and apostles on appeal.
17. Praecipe for apostles on appeal.
18. Stipulation as to transmittal of original exhibits.
19. Order directing transmittal of original exhibits.
20. Clerk's certificate.
21. Citation on appeal, with admission of service.

BYERS & BYERS and
JNO. A. HOMER,
Proctors for Petitioner.

[Endorsed]: Filed Jun. 2, 1926. [100]

[Title of Court and Cause.]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO APOSTLES ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 100 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the apostles on appeal herein, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on benalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [101]

Clerk's fees (Act of Feb. 11, 1925), for making record, certificate or return, 245 folios at 15¢ $36.75

Certificate of Clerk to Transcript of record, with seal ..... .50

Certificate of Clerk to Original exhibits, with seal ..... .50

Total $37.75

I hereby certify that the above cost for preparing and certifying record, amounting to $37.75, has been paid to me by the proctors for the appellant.

I further certify that I herewith transmit the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court at Seattle, in said District, this 21st day of June, 1926.

[Seal] ED. M. LAKIN,
Clerk United States District Court for the Western District of Washington.

By S. E. Leitch,
Deputy. [102]

[Title of Court and Cause.]

CITATION.

The President of the United States to Ella J. Harvey, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, California, on the 2d day of July, one thousand nine hundred and twenty-six, pursuant to an appeal *from a District Court* of the District

Court of the United States for the Western District of Washington, Northern Division, in a certain cause in admiralty, wherein you are claimant, to show cause, if any there be, why the decree rendered against the Kitsap County Transportation Company, petitioner, dismissing its petition for limitation of liability, should not be corrected and reversed and why speedy justice should not be done to the parties in that behalf.

Given under my hand at the City of Seattle on the 2d day of June, in the year of our Lord one thousand nine hundred and twenty-six, and the 151st year of the Independence of the United States.

[Seal] JEREMIAH NETERER,
United States District Judge. [103]

Service of the foregoing citation is hereby admitted this 2d day of June, 1926.

WINTER S. MARTIN,
HERMAN S. FRYE,
Proctors for Ella J. Harvey, Claimant.

[Endorsed]: Jun. 2, 1926. [104]

[Endorsed]: No. 4889. United States Circuit Court of Appeals for the Ninth Circuit. Kitsap County Transportation Company, a Corporation, Appellant, vs. Ella J. Harvey, Claimant of the Gas Screw "Suquamish," Her Tackle, Apparel and Furniture, Appellee. Apostles on Appeal. Upon Appeal from the United States District Court for

the Western District of Washington, Northern Division.

Filed June 23, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

IN ADMIRALTY—No. 9609.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation of the State of Washington, Owner of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture, for Limitation of Liability.

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Petitioner,

vs.

ELLA J. HARVEY,

Claimant.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO ORIGINAL EXHIBITS.

United States of America,
Western District of Washington,—ss.

I, Ed. M. Lakin, Clerk of the United States Dis-

trict Court for the Western District of Washington, do hereby certify that the enclosed exhibits are the original petitioner's exhibits introduced and admitted in evidence at the trial of the above-entitled cause in said District Court, which are directed by order of Court herein to be forwarded to the Circuit Court of Appeals for the Ninth Circuit, to be considered by it as a part of the record on appeal herein in lieu of copies of said exhibits.

WITNESS my hand and the seal of said District Court, at Seattle, this 21st day of June, 1926.

[Seal] ED. M. LAKIN,
Clerk.
By S. E. Leitch,
Deputy.

Filed Jun. 23, 1926.

F. D. MONCKTON,
Clerk.

FORM 841 "9605" Attachment "Exhibit" 1 FILE NO. V 5489

[33d Ed.]

THIS CERTIFICATE EXPIRES May 15 , 1924

UNITED STATES OF AMERICA

DEPARTMENT OF COMMERCE

STEAMBOAT-INSPECTION SERVICE

CERTIFICATE OF INSPECTION

FOR STEAM OR MOTOR VESSEL

State of WASHINGTON
District of SEATTLE Passenger *Vessel* SUQUAMISH

APPLICATION in writing having been made to the undersigned, *Inspectors for this District*, to inspect the above-named vessel propelled by crude oil , of Seattle , in the State of Washington whereof The Kitsap County Transportation Company is owner , and Wallace O. Hanson is Master, said inspectors, having completed the inspection of the vessel on the 15th day of May , 1923 , DO CERTIFY that the said vessel was built at Seattle , in the State of Washington , in the year 1914 ; rebuilt in the year 1 - ; that the Hull is constructed of wood ; and, as shown by official records, is of 75 gross tons; that the said vessel has - Staterooms and - Berths, and is allowed to carry 140 passengers, viz: 140 First cabin, - Second cabin, and - Deck or Steerage Passengers.

Included in the entire crew hereinafter specified and designated there must be two certificated lifeboat men.

This vessel is required to carry an alternate crew when operating more than 14 hours in any one day.

also is required to carry a full complement of licensed officers and crew, consisting of Master, Master and Pilot, 1 Pilot , - Chief Mate , - Second Mate , - Third Mate , - Inland Mate , - Chief Mate and Pilot , - Second Mate and Pilot , - Third Mate and Pilot , - Inland Mate and Pilot , - Quartermaster , - Able Seamen, - Seamen, - Apprentices, 2 Deck Hands , 1 Chief Engineer, - First Assistant Engineer , - Second Assistant Engineer , - Third Assistant Engineer , - Junior Engineer , - Water Tender , - Oiler , - Firemen, - Coal Passer , - Wiper , - Watchmen, and also - persons when needed in Steward's and other departments not connected with the navigation of the vessel; that the said vessel is provided with 1 Semi Diesel ~~Condensing~~ Engine of 10½ inches diameters of cylinders and one feet stroke of piston, and - Boiler , - feet in length and - inches in diameter, made of lawful - , in the year 1 - , rebuilt in the year 1 - The said vessel is permitted to navigate, for one year, the waters of the Puget Sound between Seattle and all points , and touching at intermediate ports, a distance of about 40 miles and return.

WE FURTHER CERTIFY that the said vessel at the date hereof is, in all things, in conformity with the laws governing the Steamboat-Inspection Service and the Rules and Regulations of the Board of Supervising Inspectors.

THE FOLLOWING PARTICULARS OF INSPECTION ARE ENUMERATED, NAMELY:

Anchors, No. 1	Cables, No. 1		
Has signal lights	Yes		
Metal lifeboats	No. 2		
Wooden lifeboats	No. -		
Working boat	No. -		
Collapsible lifeboats	No. -		
Every lifeboat has equipment in accordance with the rules	Yes		
Life rafts	No. -		
Life preservers for adults	No. 140		
Life preservers for children	No. 10		

Auxiliary life-saving appliances, No. and kind	2 Ring Lifebuoys		
Has line-carrying projectiles, and means of propelling them	-		
Fire extinguishers	No. 2-1		
Portable hand fire pumps	No. -		
Double-acting hand fire pumps	No. 1		
Fire hose, total length of	100	feet.	
Fire buckets	No. 8		
Water barrels	No. -		
Water tanks, No.	Area No. 2		
Date when shaft was last drawn	-		

MAIN BOILERS.		
Boiler plate: Thickness of	X	
Tensile strength of	X	
Record in local inspectors' office at	X	
Boiler shell drilled	X	
Thickness of plate found		1 16 inch.
Longitudinal seams	X	riveted.
Holes	X	
Maximum steam pressure allowed		lbs.
Hydrostatic pressure applied	X	lbs.
Main steam pipe, thickness of		inch.
Feed pumps for boilers	X	No.
Steam fire pumps, double-acting		No.

DONKEY BOILERS.		
	X	
No.	X	When built, 1
Diameter of	X	
Thickness of plate	X	
Tensile strength of plate	X	
Record in local inspectors' office at	X	
Maximum steam pressure allowed to donkey boiler,	X	pounds.
Hydrostatic pressure applied to donkey boiler,	X	pounds.

State of WASHINGTON
City of SEATTLE } SS.: Charles H. White , *Inspector of Hulls.*
Davine L. Craft , *Inspector of Boilers.*

Subscribed and sworn (Sworn or affirmed.) to before me this 17th day of May , 1923 , by Charles H. White Inspector of Hulls, and by Davine L. Craft , Inspector of Boilers.

Office of U. S. Local Inspectors,
District of (Port) Seattle, Wash. May 17, , 1923 Deputy Collector

WE HEREBY CERTIFY that the above certificate is a true copy of the original issued by this office to the vessel named herein.

, *Inspector of Hulls.* Thomas Short , *Inspector of Boilers.*

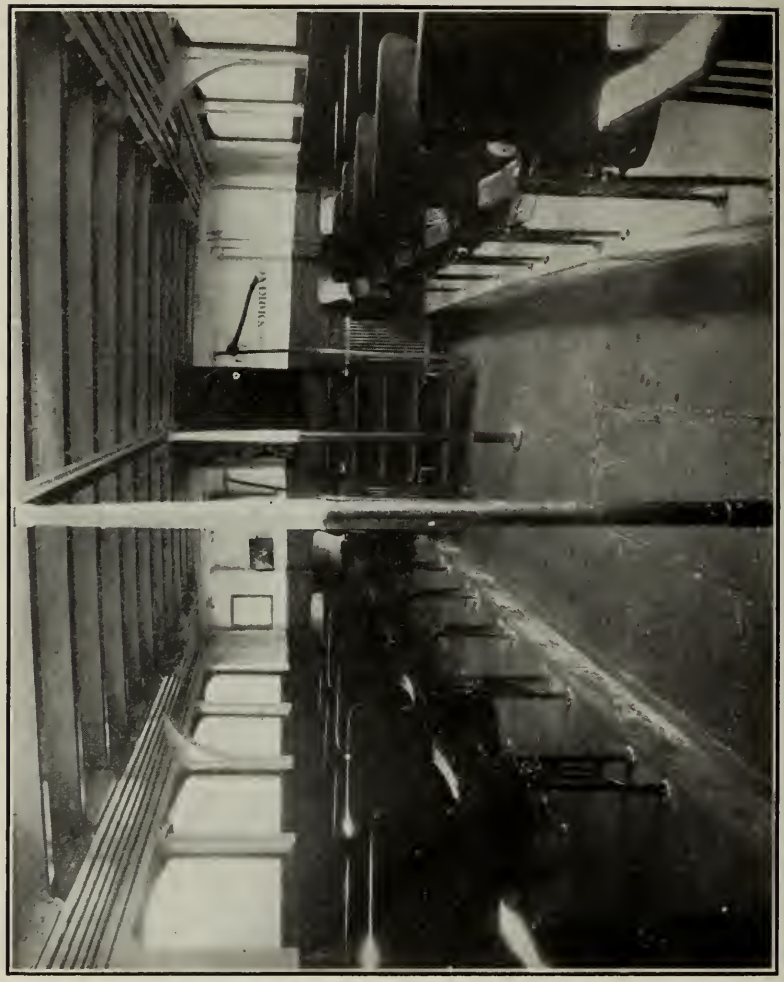
On vessels of over 25 gross tons, the original certificate must be framed under glass and posted in a conspicuous place in the vessel where it will be most likely to be observed by passengers and others. On vessels of not over 25 gross tons, the original certificate must be kept on board to be shown on demand. (*Section 4415, Revised Statutes.*)

Steam pleasure yachts are forbidden to carry merchandise or passengers for pay, unless upon change of character by the Inspectors of the Steamboat-Inspection Service.

11—4188

[Endorsed]: Petitioner's Exhibit No. 1. No. 4889. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 23, 1926. F. D. Monckton, Clerk.

PETITIONER'S EXHIBIT No. 2.



[Endorsed]: Petitioner's Exhibit No. 2. No. 4889. United States Circuit Court of Appeals for the Ninth Circuit. Filed Jun. 23, 1926. F. D. Monckton, Clerk.

No. 4889

United States
Circuit Court of Appeals

For the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HON. GEORGE M. BOURQUIN, JUDGE

BYERS & BYERS
and
JOHN A. HOMER
Proctors for Appellant
P. O. Address: 310 Marion Building, Seattle, Wash.

United States
Circuit Court of Appeals

For the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a Corporation,

Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," Her Tackle, Apparel and Furniture,

Appellee.

Brief of Appellant

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

HON. GEORGE M. BOURQUIN, JUDGE

STATEMENT OF THE CASE

This is an action in limitation of liability of the petitioner, Kitsap County Transportation Company. The petitioner filed its libel and petition setting forth

that it is a corporation of the said district, owner of the Gas Screw "Suquamish," that a claim had been made against the vessel exceeding the value thereof, which claim was made on account of defects in the said vessel and negligence in the management of the said vessel. The petition further set forth that the vessel was manned and equipped in full compliance with the laws of the United States and fully found in every particular and was constructed in all particulars in compliance with the rules established by the laws of the United States. It further set forth that it had earned $4.90 in passenger fares and no freight and that neither the owner nor representative of the owner was present at the time the accident from which the claim arose occurred, or knew of the cause thereof until after the time of its occurrence, and that the said accident happened and that the loss, damage or injury occurred, without the privity or knowledge of the petitioner, but that one Ella Harvey claimed to have been injured by the negligence of petitioner and had brought suit in the state court to recover damages on account of said injuries, and would continue to prosecute petitioner unless restrained. That the said Ella Harvey claimed damages in the sum of $12,500.00 and that the said sum greatly exceeded the value of the said "Suquamish" and that

the said damage to claimant was due wholly to her own negligence.

Upon said petition the usual proceedings were had, appraisers were appointed, notice of appraisement was given, appraisement was duly made, a stipulation for value filed, monition filed and entered, and restraining order issued and served. (p. 5 to 9.)

The claimant filed and served her answer and claim and alleged therein, among other things, that the ladies' cabin was located in the hull or hold of said vessel and that the seats thereof were built on a platform raised about 10 inches above the plane of the cabin deck; that the seats were placed close together and that each row of seats is placed flush with and perpendicular to the side of the raised platform and that no place or platform was provided for the passenger to step upon before stepping into the narrow space between the two rows of seats; that the seats provided were small and cramped and that a woman passenger could not readily see the platform. The claimant denied that the alleged defects were plainly visible and denied that the vessel was equipped in full compliance with the laws of the United States and alleged that petitioner well knew the design and build of the platform and arrangement of chairs and rows of chairs for the accommodation of women passengers

when it adapted said vessel, so arranged, to the carriage of passengers and that said arrangement was dangerous when adapted to women passengers, all of which the petitioner then and there well knew, and that the foregoing raised platform, chairs and rows of chairs, constituted defects and imperfections in the hull within the meaning of Sec. 4493, U. S. R. S. Claimant further denied that the damage occurred without the privity or knowledge of the petitioner, and alleged that petitioner knew of the faulty defects and imperfect design, build and arrangement of the seating platform and its chairs and equipment. The claimant admitted the making of a claim and that the amount demanded was $12,215.50 and that the vessel was fairly appraised if a limitation was granted. Claimant further set forth that in the filing of the claim she did not intend to confer jurisdiction on the Court to determine the case upon its merits but made her claim without prejudice to her right to maintain her cause in the Superior Court. The claimant then set forth affirmative allegations substantially as set forth in her claim and answer to the petition, except to set forth the nature and extent of her injuries and the items of her expenses. (p. 10 to 18.)

To the allowance of the claim of claimant the petitioner duly filed its objections on the ground that if claimant suffered injury it was on account of her own

negligence and not on account of any fault or lack of care of petitioner. (p. 19.)

The case came on for hearing and the petitioner first submitted its evidence on its right to have its liability limited. The claimant then, without motion to dismiss the proceedings, submitted the proof of her claim and her evidence tending to controvert petitioner's right to limit its liability. At the close of claimant's testimony the petitioner moved the court to disallow the claim of claimant for the reason that no negligence of petitioner was shown; that all of the alleged defects were not in fact defects at all but were conditions, which were in plain sight and that claimant had admitted in her own testimony that her injury was caused by her own carelessness.

This motion being denied, the petitioner then entered its testimony controverting the testimony of the claimant, and again renewed its motion that the claim of the claimant be not allowed. The claimant at that time moved that the petition for limitation of liability be denied.

The Court rendered its decision dismissing the petitioner's proceedings for limitation of liability (p. 20) and thereafter rendered its judgment in conformity therewith. (p. 23.)

Specification of Error I

The Court erred in failing and refusing to make any finding or decision on the question of whether petitioner was guilty of negligence which caused or contributed to the injuries and damages, if any, sustained by the claimant, and that it failed to find that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by the claimant. (Assignments of Error 2, 4 and 5, p. 28.)

Specification of Error II

The Court erred in this: That it failed and refused to find and decide that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injury sustained by her. (Assignments of Error 3, p. 28.)

Specification of Error III

The Court erred in this: That it failed to find and decide that the damages and injuries, if any, sustained by claimant were occasioned without any privity or knowledge on the part of the petitioner. (Assignments of Error 6, 7 and 8, p. 29.)

Specification of Error IV

The Court erred in this: That it entered an order judgment and decree dismissing the petition of petitioner for limitation of liability and awarding costs against the petitioner for the reasons set forth in the preceding assignments of error, and that it failed and refused to grant a rehearing and a new trial. (Assignments of Error 9 and 10, p. 29.)

Exceptions to the foregoing errors were allowed by the Court. (p. 25 and 26.)

ARGUMENT

Specification of Error I

The court erred in failing and refusing to make any finding or decision on the question of whether petitioner was guilty of negligence which caused or contributed to the injuries and damages, if any, sustained by the claimant, and that it failed to find that the petitioner was not guilty of negligence which caused or contributed to the injuries, if any, sustained by the claimant. (Assignments of Error 2, 4 and 5, p. 28.)

We think this error was induced from a fundamental misconception of the learned trial court in regard to its province, duty and jurisdiction in proceedings to limit liability. We believe it is manifest that the first

thing to be decided is: Was the petitioner guilty or not guilty of negligence? And, second, did the petitioner comply with the laws of the United States so as to entitle it to a limitation of its liability if it was guilty of negligence? If it was not guilty of negligence it is entitled to a limitation of liability as a matter of course, because it has no liability whatever and the limit must be zero. If it is guilty of negligence but complied with the laws of the United States, provided that the said negligence was not within the privity or knowledge of the owners, then it is entitled to a limitation of liability to the value of the vessel and its freight then pending. The learned trial court was content with the *assumption* that if the petitioner was negligent, or, in his words, "If the claimant is entitled to recover * * * it was by reason of known defects and imperfections," and yet, there is no decision or even intimation that the claimant *is* entitled to recover at all. In fact there is an intimation in the decision that she is *not* entitled to recover. The court's words "*claimant is entitled to pursue her common law remedy and case, if she has any,*" could be susceptible of no other interpretation than that a doubt existed in the mind of the trial court as to whether she was entitled to any recovery at all, but, the Court, instead of performing its duty, relegated the whole matter to another court without deciding the question

presented for his decision, disregarding the decisions it cites in its support, which preclude the administration of this branch of the admiralty from being hampered by proceedings in various and conflicting jurisdictions. It could make no difference on petitioner's right to limit its liability that "if there were any defects it is very plain that they were in the hull." To prevent limitation it is necessary to find that there *were defects in the hull*, and that petitioner knew there were defects in the hull and the Court is not entitled to indulge in "ifs." Any other conclusion must be a reversible error, for it results in this absurd condition: a petitioner cannot contest its liability in the proceedings independently of its rights to limitation of liability, or, in other words, if, in its proceedings for limitation of liability, it appears that it is *not negligent*, it cannot limit its liability, because it is unnecessary for the court to pass upon that issue and this admiralty question must be relegated to a common law court; on the other hand, it is only entitled to limitation when it actually is negligent, but without knowledge or privity of the same. This is not the law.

If we assume that "if claimant is entitled to recover it is because of a condition in the hull," and that then petitioner is not entitled to limit its liability, what then becomes of petitioner's rights if claimant

is *not* entitled to recover and what becomes of the allegations in the petition, denied in the claim and upon which proof is entered? If they are material to the petition and the claim are they not material to and required to be settled by the decision of the Court? Manifestly the vital question to be determined the Court failed to decide, though all the issues thereon were duly made up, all the parties interested were before the Court, evidence was offered pro and con, and the entire matter submitted to the Court for its determination. The evidence on both sides being entered without objection, there can be no question raised but that the Court had jurisdiction of the parties and of the subject matter of this alleged maritime tort. The theory of the Court, carried to its logical conclusion, would defeat the right to limit liability whenever it is *alleged* that an accident was caused by a "defect or imperfection of the steaming apparatus or hull" of the vessel, whether there were in *fact* such defects or not.

II.

On the second branch of this specification: The Court should, from the undisputed evidence, have found that the petitioner was guilty of no negligence whatever.

The arrangement of the seats is illustrated in the small photograph (Petitioner's Exhibit 2). L. H. Coolidge, a naval architect of nineteen years' experience in Seattle, testified that he had been acquainted with the "Suquamish" ever since she was built and that the seats and arrangement were the usual and standard type of construction in vessels of that type and class, and it was as safe as any other step made use of in vessel designing (p. 43 et seq.), and that he did not know of a better arrangement.

Frederick S. Brinton, a naval architect, practicing his profession in Seattle since 1897, testified that he designed the "Suquamish" and the seating arrangements, though not original with him, was as he designed them, and the appliances and equipment were of the usual and standard type for that class of vessels. Both of these architects stated that the arrangement gave more head room and greater stability to the vessel. (p. 49, et seq.)

Charles E. Taylor, who operates a large shipbuilding plant, testified that he was well acquainted with vessels of the kind and type of the "Suquamish"—had been building them for twenty-five years, and that the seating arrangement was the ordinary and usual arrangement in vessels of the character and type of the "Suquamish." (p. 56, et seq.) These were disinterested witnesses.

John L. Anderson, president of the petitioner corporation, testified that he had been an operator of steam vessels for thirty-eight years. He too testified that the seats and seating arrangement was of the standard type of the vessels of the character and size of the "Suquamish." Each of these witnesses gave one or more examples of other vessels in which the seating equipment and arrangement were identical with the "Suquamish." (p. 60 et seq.)

Philip D. Macbride, vice-president of petitioner corporation, testified that he was acquainted with nearly all the vessels of this type and class on Puget Sound. That the equipment was the standard type and arrangement; that the vessel had been in operation since 1914; had carried over 40,000 people per year, an aggregate of about 500,000 passengers, and that no accident of this kind had ever theretofore occurred. (p. 37, et seq.)

We call the *particular attention* of this Court to the fact that no where is it contended by the claimant that there was any defect or fault in the chairs, in the step, or in the floor. In fact it is not contended otherwise, and must be conceded that there was nothing to cause claimant to slip or trip or cause her injury on account of anything whatever not being in perfect condition. There was no cleat, no worn place,

and nothing whatever was allowed to get out of order or become imperfect; and claimant makes no contention that there was any defect or imperfection with respect to such matters. The sole fault, if any, was in the arrangement. In other words, the equipment in itself was perfect. Aside from the evidence of the witnesses above mentioned, the vessel in this exact condition in regard to this equipment and arrangement, was passed and approved by the United States steamboat inspectors. (p. 54, Petitioner's Exhibit 1.)

This evidence of the petitioner is undisputed by any statements, fact or circumstance worthy of the name of evidence. How can an owner be guilty of negligence who has seating arrangements designed by a professional and competent architect of standing and experience, the arrangement passed upon by the United States inspectors, has kept the seats and equipment in perfect condition during all the years since they were built, and has carried 500,000 passengers without mishap? What other answer can be given to the question than that the owner was without negligence? It was therefore incumbent upon the Court to make a finding that the petitioner was without negligence and especially is this true when it is shown how the accident really happened by the

testimony of the claimant (p. 78), from which we quote, as follows:

"Q. You stepped up?

"A. I certainly did.

"Q. And there was nothing to prevent you from seeing that you stepped up?

"A. Nothing at all. * * *

"Q. Was there anything to prevent you seeing the floor?

"A. Nothing but carelessness maybe. I looked up instead of down.

"Q. But you could have looked down if you had wanted to, couldn't you?

"A. I suppose I could. I was looking at the door —how to get out. * * *

"Q. Now all the time that you were going on that trip, Mrs. Harvey, was there anything to prevent you looking down at the floor and seeing just how that step stepped off?

"A. I don't know that there was.

"Q. Did you notice it when you stepped up?

"A. Certainly. Certainly I knew that.

"Q. And when you noticed that you stepped up you would know that you would have to step down when you got off wouldn't you?

"A. I presume so." (pp. 78-79-80.)

Claimant's daughter, who accompanied her on the trip, testified as follows:

"Q. When you went into those seats you necessarily had to step over (up); must have know there was a step when you stepped up?

"A. Perhaps. * * *

"Q. And Mrs. Harvey had simply to look across to see the step on the other side?

"A. If she had looked.

"Q. And she could have looked if she had wanted to?

"A. She was not anticipating this fall.

"Q. She could have seen this step? There was nothing to prevent her from looking. The step was in plain sight was it not?

"A. I suppose.

"Q. Also the step you took to get to the chair on which she was seated was in plain sight when she took the chair?

"A. I presume so. (p. 71.)

In *Savage v. N. Y. & N. H. S. S. Co.*, 185 Fed. 778, decided by the Circuit Court of Appeals for the Second Circuit, it appeared that the vessel was so constructed that a chain box, covering a necessary part of the steering gear, extended on both the port and starboard sides of the vessel from the deck house to the rail, and that such type of construction was common and well known in passenger vessels of the size and age of the vessel in question. Plaintiff in the action was injured in stumbling and falling over the chain box, and claimed negligence in the manner in which it was constructed, but the Court held that negligence of the owner *could not be predicated* on the structure of the vessel although there was evidence that a sloping cover for the steering chain would have

been less dangerous. The law of that case is especially applicable to the facts of the case at bar, for which reason we quote the following from the decision:

"It is proved without contradiction that the particular construction or arrangement of the steering gear is extremely common in vessels of the age and size of the "Rosalind" and has long been well known in vessels used for passenger traffic. Therefore, no negligence as against the owners of the vessel can be predicted on the construction of the ship, but it has been said, inasmuch as the promenade deck has been given over to the use of passengers and as the structure in question is one over which people may fall, peculiar care is necessary in guarding or warning passengers exposed to this possible injury. This may be true, but it is not necessary to dwell upon it in the case because of the finding heretofore made that during all of the time that Mrs. Savage was on board the "Rosalind" until the time of the accident the obstruction was obvious and that which is obvious to one of ordinary intelligence and in possession of his physical senses does not require warning."

To the same effect and a quite similar case is "The Southside," 155 Fed. 364, where liability was limited.

Negligence is never presumed but must be proven, and the mere fact that an accident happened or an injury received gives rise to no presumption of negligence. In the case at bar there is not only a failure of proof of any negligence, but there is affirmative

proof that petitioner was free from negligence, and it was the duty of the trial court to so find and dismiss and disallow the claim, retaining jurisdiction of the petition for limitation for that purpose.

Specification of Error II.

The Court erred in this. That it failed and refused to find and decide that if claimant sustained any damage or injury it was due to her contributory negligence which was the proximate cause of any injury sustained by her. (Assignment of Error 3, p. 28.)

Claimant asserts these grounds as the basis of her right to recovery:

(a) The seats on a platform being 10″ above the level of the aisle between them;

(b) The seats being too close together;

(c) Failure to post a notice or warning of the existence of the step.

We take up the latter point (c) first and ask: What purpose could a notice serve which could not be more obvious than the thing itself? An examination of Exhibit 2 will disclose that there was no difference between the step to the platform on which the seats were placed and the steps of the stairs. The steps on the stairs leading down to the cabin were of the same kind. What object could there be in posting a notice saying: "These are steps. You step down"; or, at

the bottom: "These are steps. You step up?" The cabin was well lighted—each side of a fourteen foot cabin consisting of a row of windows—and it was a bright, sunny day. (p. 67.) If a step that one must both see, feel and experience in stepping up would not be observed, why should it be assumed that a notice calling attention to a thing so obvious would be seen or heeded? A notice is only required in law to direct attention to some hidden defect, some trap or something not open and obvious as was said in the Savage case, supra: "that which is obvious to one of ordinary intelligence and in possession of his physical senses does not require warning." We submit that there is no merit in the contention that a notice should have been posted.

As to her claim (b) that the seats were too close together, we answer that the seats were regular theatre seats. They were placed about 29 inches apart which is the standard distance between seats in theatres, churches and trains. The seat itself could be raised if the occupant desired when passing out. Indeed, a witness for claimant testifies that they were very similar to seats in a street car, and that each of these seats was perfectly visible is evidenced by the testimony of the claimant herself. (p. 78.) There were very few passengers on board that day. (p. 79.)

As to claimant's contention (a) with respect to the raised platform, we answer that in addition to the fact that the construction was of the usual manner in like vessels, that this condition was perfectly apparent, and open to anyone who was in possession of his faculties, and of practically the same type of construction as the platform upon which is placed the witness chair in a court room, or the rear row of the seats of jurors in practically all jury boxes everywhere. That the claimant was injured simply and solely because of her failure and refusal to use her faculties is perfectly apparent from an inspection of Petitioner's Exhibit 2, and from a perusal of her own testimony.

In the case of *Johnson v. Port Washington Route*, 121 Wash. 460, recovery was denied to a passenger on a vessel who was injured in stepping off the end of a gangplank. We quote from the syllabus in that case as follows:

"That a passenger alighting from a steamboat in broad daylight is guilty of contributory negligence precluding recovery where she stepped off the end of the gangplank without looking to see if there was another step at the end of the gangplank and fell because of her failure to use her faculties."

We also call attention the following cases:

Dunn v. Kemp & Herbert, 36 Wash. 183,

denying recovery to a person injured in falling down a store stairway which was in plain view;

Hollenback v. Clemmer, 66 Wash. 565,

holding that the mere fact that one step down is maintained at a side exit of a moving picture theatre is not evidence of negligence where the way was properly lighted.

Hogan v. Metropolitan Building Company, 120 Wash. 82,

denying recovery to a customer of a store who stepped on an inclined entrance, where the incline was open and apparent, and no steeper than many entrances to similar places in the same city.

Although a common carrier of passengers may be held to exercise the highest degree of care compatible with the safe operation of the utility, the carrier is not an insurer of the safety of the passengers, and these cases show that steps up and down are so common and human experience is such that the law has become established that no neglect of duty exists where the steps are open and obvious to those entitled to use the same.

Hutchinson on Carriers (3rd Ed.) Vol. 2, Sec. 942, after stating conditions which would hold a carrier liable, states:

"But he cannot be held responsible for injuries received from obstructions on a wharf or vessel which

were in plain view and could easily have been avoided by the passenger."

citing *Strutt v. Brooklyn, etc., Ry. Co.*, 45 N. Y. S. 728, where recovery was denied a passenger who stumbled over a hose on a wharf, and *Sedden v. Beckley*, 25 Atl. 1104, where the carrier was held not liable to a passenger who stumbled over a gangplank in its usual place on the vessel.

We also call attention to

> *Race v. Union Ferry Co.*, 138 N. Y. 744; 34 N. E. 280,

denying recovery to a passenger who fell in stepping down from the bridge on to a ferry;

> *Fogassi v. N. Y., etc., R. R. Co.*, 45 N. Y. S. 175,

relieving a railroad company from liability to a passenger for injuries received in leaving a vessel by the gangplank and stepping off the same and falling into the water. The Court in the last case cited says:

"Passengers upon public conveyances are bound to take some care of themselves and where there is a manifest danger they are required to use reasonable care to avoid it."

Specification of Error III.

The Court erred in this: That it failed to find and decide that the damages and injuries, if any, sus-

tained by claimant, were occasioned without any privity or knowledge on the part of petitioner. (Assignments of Error 6, 7 and 8.)

The trial court, in its decision on this point, says:

"Now, in the instant proceedings, it is very clear that if claimant is entitled to recover it is because of a condition of the hull (see The Europe, 175 Fed. 608; 190 Fed. 479) of the vessel, which was actually created and maintained by petitioner—because of and by reason of known defects and imperfections. Hence, all within petitioner's privity and knowledge. That is to say, the grounds upon which alone a ship owner's liability can be limited are conspicuously absent. That ends these proceedings. For if, in these proceedings it should appear that the disaster did happen with his privity and knowledge * * * he would not obtain decree for limited liability. Butler v. Co., supra."

The trial court fell into two errors in the conclusions of its decision on this point. One error is due to the assumption of the Court that because a certain *condition* existed, which was created at the time of the construction of the vessel, and hence within the knowledge and privity of the owners, that the petition must be dismissed. But, the trial court failed to grasp the essential feature of the right to limit liability, which is, not that the owners of the vessel shall have knowledge of a condition, but they must have knowledge that the condition was dangerous,

was defective or imperfect, or that it was created by their personal negligence. The trial court begged that important question by stating that "if the claimant is entitled to recover, it is because of known defects and imperfections." That is the very question which the trial court was called upon to determine, viz., whether the condition which it found to exist was defective or imperfect. If it had found that the condition constituted a defect and imperfection, its conclusion might follow that it was within the privity or knowledge of the owners and hence defeat the right to limitation. The inference may well be drawn from the language of the Court that it did not regard the condition as defective or the claimant as entitled to recover for the language used is: "If claimand is entitled to recover, etc."

While the Court is no doubt familiar with Sec. 4283 of the U. S. Revised Statutes under which the proceedings are brought to limit liability, we here set forth that section for the convenience of the Court, as follows:

"The liability of the owner of any vessel, for any embezzlement, loss or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned or incurred without the privity, or knowledge of such own-

er or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

It must be conceded that under the record in this case the actual occurrence by which claimant was injured was without the privity or knowledge of the owner of the vessel. It had no personal knowledge that claimant was a passenger or that she had been injured until the matter was brought to its attention some time after the incident. It seems to us it must be held that it was "done, occasioned or incurred without the privity or knowledge of the owner." However, if it be assumed, as the trial court did, that the owner had knowledge of the *condition* which resulted in the injury, that is a very different matter from assuming that it had knowledge or privity that such a condition was defective. The trial court did not pretend to decide that the condition was defective. We are satisfied that the evidence conclusively established that the condition was not defective. But, in any event, if the statute is to be construed so as to deny the limitation where an accident is one of which the owner had no personal knowledge, but was due to a condition of which it had knowledge, before the limitation can be denied, the condition must be shown to be a defect and that the owner had actual knowl-

edge, or at least constructive knowledge, that such a condition constituted a defect.

The "Annie Faxon," 75 Fed. 312 (9th C. C. A.), cited by the trial court in its decision, is in no sense an authority sustaining the conclusions of the trial court. On the contrary, it sustains the contention of petitioner that the limitation should be granted, because it shows that the privity or knowledge necessary to defeat the limitation will not be imputed to a corporation unless the defect (not condition) was apparent and of such a character as to be detected by the inspection of an unskilled person, if the corporation has, in good faith, employed a competent person to inspect the vessel. We quote from the decision in the "Faxon" case as follows:

"We are unable to perceive how there could be imputation of privity or knowledge to a corporation of defects in one of its vessels' boilers unless the defects were apparent and of such a character to be detected by the inspection of an unskilled person. * * * It is sufficient if a corporation employ in good faith a competent person to make such inspection. When it has employed such person in good faith and has delegated to him that branch of its duty, its liability beyond the value of its vessel and freight ceases so far as concerns injuries and defects of which it has no knowledge and which are not apparent to the ordinary observer but require for their detection the skill of an expert."

In the "Faxon" case it appeared, as in the instant case, that the owners had caused the vessel to be inspected by the United States Inspector of Hulls and Boilers, as required by law, and this, in connection with the employment of skilled engineers, as in the instant case, the owners had employed skilled architects and constructed the vessel in accordance with standard type of construction used in such vessels, was sufficient to entitle the owners to limit their liability. So it seems plain that it was not only the duty of the trial court to find whether a defect existed, but also to find that the owner had knowledge that it was a defect, before it could dismiss the petition.

Some *dicta* in the "Erie Lighter 208," 250 Fed. 490, are relied upon as authority for the decision of the trial court. In that case the Court states as follows:

"That it is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this court may undoubtedly proceed to determine whether it is liable at all, and, if so, to fix and assess the damages that should be awarded to claimant. * * * On the other hand, *if the petitioner may not avail itself of the limited liability statutes*, it would seem beyond any authority and reason that at least without claimant's consent this court is without jurisdiction to proceed further but must dismiss the proceedings, leaving the claimant free to pursue his remedy in the courts of New Jersey." (Italics supplied.)

Distinguishing these statements from the case at bar, however, it will be noted that the Court in the instant case did *not* determine that the petitioner was *not entitled to limit its liability.* It only determined that *it was not* entitled to limit its liability *if the claimant is entitled to recover,* and did not decide at all that the claimant *was* entitled to recover or that the petitioner had knowledge or privity of any defects, but only that the petitioner had knowledge or privity of the defects *if there were any,* which makes a vast distinction between the above statement in the case of the "Erie Lighter 208" and the instant case. However, the authority of the "Erie Lighter" in that matter may well be questioned.

In the first place, it is but the *dictum* of a *nisi prius* court. It is not agreeable to the holding of the District Courts sitting in the State of Washington.

In the second place, the Court in that case does not hold in conformity with the *dictum* above set forth, and this *dictum* is not fortified by the decisions cited in support of its decision. The Court actually holds in favor of the petitioner, and *allowed its limitation of liability,* though it did find that the injuries were "due wholly to a structural defect of the lighter." The Court says:

"I have no doubt that the petitioner's liability should be limited to the value of the latter vessel. If the decision of the Circuit Court of Appeals of the 6th Circuit in Thompson Towing Co. v. Wrecking Association, 207 Fed. 209, is at variance with this conclusion, I do not think that that case can well be reconciled with the decisions of the Circuit Court of Appeals of the 2nd Circuit above cited. The latter, I think, present the view which is more in harmony with the spirit in which the Supreme Court has many times held that the limitation of liability act should be construed."

It will thus be seen that if the theory of the claimant in the instant case is correct, that the defects, conceded for sake of argument to be a part of the hull, (which we deny and to which we shall hereafter refer) were structural defects in the original structure and the right to a limitation would be granted even under the authority of the "Erie Lighter."

In the third place, if the case is susceptible of the construction and application given it by the learned trial court, it has, so far as any such application and construction are concerned, been repudiated by the Circuit Court of Appeals for the Second Circuit in the 84-H Appeal of Bouker Contracting Co., 296 Fed. 427, decided December 17, 1923, in which case it is referred to. We quote from the decision in the Bouker Contracting Co. case:

"In the instant case the court below found that the petitioner was not negligent. The evidence, said the court, showed that the work was conducted in the usual way. * * * I can, therefore, find no negligence on the part of the contracting company. If there was no fault or negligence for the ship owner to be privy to and have knowledge of within the meaning of the statute, there is no liability to be limited *and the court should have granted the petition. Instead the petition was dismissed and the injunction staying the proceedings in the state court was vacated. This was manifest error.*" (Italics supplied.)

In the Bouker case the construction placed upon the "Erie Lighter" case, and that it is not consistent with the application given the case by the trial court, is shown in the further quotation from the Bouker case:

"The company, however, knew all about the method of conducting business at the dump. Indeed privity or knowledge was admitted by the general superintendent when testifying. Under such circumstances, the proctor for the administrator of Friend says the proceedings to limit should be dismissed because privity is admitted and privity is a complete bar to the statute of limitation. This was done in cases where *negligence* and *privity* were *both shown.* See Erie Lighter 108, 250 Fed. 490, and other cases therein cited. The mistake in this case was due to the fact that this is not a case where *negligence* and *privity* were *both* shown. Where there is *no negligence and no fault, privity is a matter of no consequence.* The decree is reversed and the District Court is instructed to reinstate the petition and enter a decree exempting the

petitioner from all liability as prayed for in said petition, and issue an injunction, as also prayed in the petition aforesaid." (Italics supplied.)

We call the Court's attention to the fact that in the instant case the Court's own decision is tantamount to a finding that he could find *neither privity* or *negligence* of the petitioner, and it is conclusively shown by the evidence that there was no privity or negligence of the petitioner. The evidence conclusively shows that the seats were arranged in the usual way for boats of that kind and character which brings the cause squarely under the law as laid down in the appeal of 84-H, *supra.* This should dispose of the "Erie Lighter" so far as being an authority for the decision of the trial court in the case at bar.

The later decisions,

Pocomoke Guano Co. v. Eastern Trans. Co., 285 Fed. 7, decided by the C. C. A. for the 4th Circuit, Nov. 7, 1922;

City of Camden, 292 Fed. 93, L. C. 97, decided by C. C. A. of the 3rd Circuit in March, 1923;

Petition of Can. Pac. Ry. Co. the Princess Sophia, 278 Fed. 180,

all fail to follow any such interpretation of the "Erie Lighter" as could be construed in support of the decision of the trial court in the instant case.

That the trial court should have determined the question of negligence or of defect, as well as privity or knowledge, as was held in the 84-H Appeal of Bouker Contracting Co., 296 Fed. 427, supra, is settled by the early decision of the Supreme Court of the United States in the case of *Providence & N. Y. S. S. Co. v. Hill Mfg. Co.*, 109 U. S. 578. In that case the Court says, referring to the statute for limitation of liability:

"The question to be settled by the statutory proceeding being, *first*, whether the ship or its owners are liable at all (if that point is contested and has not been decided); and, *secondly*, if liable, whether the owners are entitled to a limitation of liability."

The first question the trial court in the case at bar did not decide at all, thus disregarding the duty imposed upon it by the Supreme Court of the United States.

The trial court also cites the case of *Weisshaar v. Kimball S. S. Co.*, 128 Fed. 397, (cited as Weisshaar v. Co.) as sustaining its decision. That case is, we think, in perfect harmony with the appeal of 84-H, *supra*, and correctly states the law. It does not at all, however, state the law as the learned trial court assumed it to be. In that case the negligence of the petitioner was proved and so decided. The knowledge and privity of the petitioner was proved and decided.

Both elements rendering proper the dismissal of the petition, as explained in the 84-H decision, were present. In the instant case neither element existed, nor did the trial court intend to imply or infer that they did exist. He evidently did not consider the existence of the first element as necessary or even proper for him to consider.

The second error into which the trial court fell was in applying to this case the provisions of Section 4493 of the U. S. Revised Statutes, which for the convenience of the Court we set forth as follows:

"Whenever damage is sustained by any passenger or his baggage, from explosion, fire, collision, or other cause, the master and the owner of such vessel, or either of them, and the vessel shall be liable to each and every person so injured to the full amount of damage if it happens through any neglect or failure to comply with the provisions of this Title, or through known defects or imperfections of the steaming apparatus or of the hull; and any person sustaining loss or injury through the carelessness, negligence or wilful misconduct of any master, mate, engineer or pilot, or his neglect or refusal to obey the laws governing the navigation of such steamers, may sue such master, mate, engineer or pilot, and recover damages for any such injury caused by any such master, mate, engineer or pilot."

It may well be doubted whether this section of the Revised Statutes was ever intended by Congress to have any application to proceedings for limitation of

liability. Section 4493 was passed by Congress February 28, 1871, (U. S. Statutes at Large, Vol. 16, p. 453). At that time Section 4283 (the limitation of liability statute) was then in effect, having been passed by Congress March 3, 1851, (U. S. Stat. at Large, Vol. 9, p. 635). Section 4493 is a part of the Steamboat Inspection Law, and we doubt if it was ever intended to fix any rule of liability against any owner who had complied wtih the inspection laws of the United States, as was done by the petitioner in the instant case. In fact that seems to be the gist of the holding in the "Annie Faxon," 75 Fed. 312, *supra*, wherein petitioners, who had had the boilers of the vessel inspected by the U. S. officers, were permitted to limit their liability. In that case, after noting that the owners had caused the inspection to be made and had received a certificate authorizing operation of the vessel for a year, the Court says in response to the objection of the claimants that the certificate was void because of neglect of duty of the inspectors:

"To this it may be said that if the local inspectors, who are public officers, failed to perform their duty, and made an insufficient examination of the vessel, the fault does not rest upon petitioners, nor is there imputation to them of knowledge of such defective inspection, they having delegated the whole matter of the inspection of their vessels to a competent employe."

Surely the certificate of inspection (Petitioner's Exhibit I) issued in the instant case means something. If the officers of the law, presumed to be competent and qualified, inspected the "Suquamish" and issued a certificate approving her operation, it should be conclusive that no defect existed in the vessel of which the owners would be held to have knowledge. The owners of the vessel are not necessarily presumed to be skilled navigators or shipbuilders. They are usually business men. It was to encourage business men to invest in shipping that the limitation of liability statute was passed. If these skilled inspectors did not find in the manner in which seats and platforms were constructed any defect, how can knowledge be imputed to the owner that such a condition was a defect for which it could be held liable?

A reading of the statute shows that the owners are only to be held liable for *known* defects. They are not liable for known *conditions*, unless the conditions are defects, and are known by the owners to be defects. Under the facts of this case, what is there to impute to the owners any knowledge that the conditions complained of were defective? The vessel was constructed under the supervision of a naval architect and was of the same style of construction with respect to seats and platform as other vessels of like

type and class. The vessel had been engaged in the passenger service 13 years, during which time she had carried approximately half a million passengers without a single mishap or accident similar to the one complained of in this case (p. 39). How, we ask, under such circumstances, could there be any knowledge imputed to the owner of this vessel that there existed any defect or imperfection with respect to seating arrangement of the vessel?

Furthermore, Section 4493 only fixes a liability upon the owner for a defect or imperfection existing in the *hull.* Therefore, we pass to a consideration of whether the seating equipment of the vessel was a part of the hull. The trial court was mistakenly of the opinion that the decision in "The Europe," 175 Fed. 608; 190 Fed. 479, was authority for holding the seating arrangement to be a part of the hull. That was a case interpreting the rule requiring a light to be carried twenty feet above the hull and therefore rendered necessary a construction of the word "hull" under that rule. There is no doubt that in that case the word "hull" was used in its colloquial sense. In other words, it meant the bulk or form of the vessel. It would do no good to carry a light twenty feet above the real hull as it might be inside one of the cabins or hidden by other portions of the house or upper works of the vessel. The purpose of the rule was to require

a light to be carried so that it could be seen on all sides of the vessel and manifestly the word "hull" was meant to include all that portion of the vessel which would obscure lights and the decision in the "Europe" so holding was only consonant with good common sense. The meaning of the word "hull" in the instant case, however, is an entirely different matter. It is perfectly apparent that the statute does not intend to include the whole of the vessel. Even Congress would not be so prodigal of words as to say through "known defects of the steaming apparatus and the hull" when it might say "known defects of the vessel." It is patent that among the things it did not intend to include were tackle, apparel, furniture and equipment mentioned in every libel that intends to include a libel of the whole of the vessel. In other words, it did not intend to include among other things non-permanent portions of the vessel. The chairs, the manner in which they were arranged, the equipment on which they were placed, under Statute 4493, are no more parts of the hull than the card-tables, the carpets or the bird cage. It is an *ex cathedra* statement of the learned trial court that "It is clear that if claimant is entitled to recover it is because of a condition of the hull." However, the *condition* of the hull has nothing to do with it. It is defects in the hull that were alleged and that was ma-

terial. This statement of the Court is based neither on the law nor on the evidence. Aside from the reasonable interpretation of the statute, as above set forth, all the witnesses who could by any possibility have any knowledge upon the subject, to-wit: Coolidge (p. 44), Brinton (p. 49), Taylor (p. 57) and Anderson (p. 61), testified that the equipment involved was no part of the hull, so the testimony, so far as testimony goes, furnishes no basis for the statement of the Court. It is equally clear that the authority cited ("The Europe," supra,) has no bearing whatever on the instant case, for all that that case decided was that Section 4493 was not modified or reversed by subsequent enactments and that under the rule involved therein the whole of the vessel was included in the word "hull," neither of which propositions are involved in the instant case.

Specification of Error IV.

The Court erred in this: That it entered an order, judgment and decree, dismissing the petition of petitioner for limitation of liability and awarding costs against the petitioner for the reasons set forth in the preceding assignments of error and that it failed and refused to grant a rehearing and a new trial. (Assignments of Error 9 and 10.)

This Specification of Error refers to the signing of the decree and the failure to grant a rehearing and a new trial.

To further argue these points is unnecessary, as they are covered by the argument under the preceding specifications, but that the decree should not have been signed, or, having been signed, should be set aside because contrary to the law and the evidence, is quite plain from the record in the following particulars:

(1) The Court failed to make any Findings of Fact at all. (Assignment of Error I, p. 28.) In the present case this was obligatory. The fact of whether or not the petitioner was negligent was a necessary fact to be adjudicated.

(2) The fact of whether the acts of the claimant caused her injuries was a necessary fact to be decided as the petitioner could not be guilty if the claimant's negligence caused her injuries. This the Court failed to decide.

(3) Whether there were or were not any defects in the vessel was a necessary fact to be decided and to hold that *if* claimant is entitled to recover it must be due to conditions of which petitioner had knowledge is by no means a decision of this point—it simply begs the question. If it were not obligatory on the

Court to make these findings one way or the other, it would certainly have been improper not to do so in the instant case. If the Court had made the finding that the petitioner was guilty of any negligence, that negligence could have been readily pointed out in the record, and be shown to be either valid or invalid. If the Court had decided that the claimant was not guilty of the negligence that caused the injury, it could then be readily determined, as a matter of law, whether or not her claim should be disallowed, but under the decree we are left entirely in the dark except as to the speculative and conditional statements of the Court contained in the decision.

There is another phase of this matter. After introducing evidence in support of her claim, and at the conclusion of all the evidence claimant moved for a dismissal of the petition. (p. 91-92.) This the claimant may not do. If it be admitted, as was stated in the "Erie Lighter," *supra*, that where both negligence and privity or knowledge are shown, the court is without jurisdiction and the petition must be dismissed unless the claimant consent to jurisdiction, how, we ask, is consent given? Can the claimant come into the admiralty court, present her claim, cross-examine the witnesses for the petitioner, submit her own evidence without objection to the

Court's jurisdiction, and then, after all the evidence is submitted without objection, move for a dismissal of the proceedings? It seems that on reason and common sense that the motion at that time comes too late and that the claimant has consented. If she was not consenting, why was she, at the close of petitioner's evidence, entering her own? What was the effect of entering that evidence? Having thus submitted her cause, with testimony without objection, to a tribunal having jurisdiction of the persons and the subject matter, it would seem that if actions only speak equally as loud as words that she has consented and could not present, at that time, a motion for a dismissal.

We, therefore, respectfully submit the following:

That all the essential allegations of the petition were proven;

That petitioner was shown to have been free from negligence, and that even if defects had been shown to exist in the vessel, that they were defects unknown to petitioner, and hence without its privity or knowledge;

That the injuries of claimant were shown to have been the result of her negligence alone;

That the prayer of the petitioner should have been granted and the claim of the claimant disallowed and the limitation of liability decreed exempting the petitioner from all liability.

We, therefore, pray that this Court will reverse the decision of the trial court and direct the entry of the appropriate orders and decree.

Respectfully submitted,

BYERS & BYERS and
JOHN A. HOMER,
Proctors for Petitioner
Kitsap County Transportation Company

United States Circuit Court of Appeals for the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,
Appellant,

vs.

ELLA J. HARVEY, Claimant of the Gas Screw "Suquamish," her tackle, apparel, and furniture,
Appellee.

No. 4889

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. GEORGE M. BOURQUIN, *Judge*

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United States Circuit Court of Appeals for the Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation, *Appellant,* *vs.* ELLA J. HARVEY, Claimant of the Gas Screw "Suquamish," her tackle, apparel, and furniture, *Appellee.*	No. 4889

Brief of Appellee

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. GEORGE M. BOURQUIN, *Judge*

ARGUMENT.

THE RIGHT TO LIMIT.

The appellee in answer to the petition in this case after alleging that the Steamer Suquamish upon which she was injured while being carried as a passenger was unseaworthy, defective, etc., denied the petitioner's right to a limitation of liability and also its right to an exoneration or exemp-

tion from liability. In paragraph six of her answer to the petition, appellee alleges:

> "That claimant in filing her claim in the above entitled cause and in answering the petition and libel of the petitioner does not intend to confer jurisdiction upon this court to hear and determine the said cause upon its merits for the reason that an action is now pending in the Superior Court of the State of Washington, for King County, in that said Cause No. 178602 entitled, "Ella J. Harvey, Plaintiff, vs. Kitsap County Transportation Company, a Corporation, Defendant," and unless by lapse of time and loss of witnesses it becomes necessary to submit plaintiff's claim and (13) demand to the above court in order that full justice may be done to claimant, and claimant makes this further answer, claim and demand to the said petition without prejudice to assert and maintaining its cause of action now pending in the Superior Court in the event plaintiff's petition for a limitation of liability be denied."

Throughout the record appellee pleaded for a dismissal of the case, claiming the right to prosecute her cause to its conclusion in the State Court.

Appellant now contends that it was not liable on the merits of the appellee's claim for damages for the reasons that:

1. That the vessel was properly built and equipped in every way and appellee was not injured by reason of any defect, etc., because there was no defect, in the vessel or hull, and it did not fail in the duty the carrier owes a passenger.

2. That appellee was herself guilty of such

contributory negligence as a matter of law as to defeat her claim for damages. These in substance are the contentions of the appellant on the merits of Mrs. Harvey's damage suit, which is now pending in the state court. This is a single claim case. Appellant filed its petition to limit liability after the Harvey suit had been filed in the state court.

Appellant in the court below, as here, asked for decree in its favor notwithstanding the obvious privity and knowledge which it had of the very condition of the aisle, seat platform, and seating arrangement which Mrs. Harvey complained of as causing her injuries.

On this appeal petitioner comes forward with the unique proposition that it is the duty of the court of admiralty in a limitation proceeding to first ascertain whether the petitioner is liable on the claim against which limitation is sought for if it is not liable the right to limit must follow.

This is a curious position in view of the limited (using the word wholly apart from the limitation statutes) purpose of the statutory remedy of limitation. It appears, however, to be supported by the decision in the second circuit in the Bouker case referred to in appellant's brief.

Appellant says in speaking of the decision of Judge Bourquin in this case:

> "We think this error was induced from a fundamental misconception of the learned trial court in regard to its province, duty, and jurisdiction in proceedings to limit liability. We

believe it is manifest that the first thing to be decided is: Was the petitioner guilty of negligence?

"And second, did the petitioner comply with the laws of the United States so as to entitle it to a limitation of its liability if it was guilty of negligence? If it was not guilty of negligence it is entitled to a limitation of liability as a matter of course because it has no liability whatever and the limit must be zero."

As the limitation statutes have been extended to debts and non-maritime claims the question now is whether in any limitation proceeding the first inquiry should be upon the merits of the claims or demands against which petitioner seeks to limit his liability, without regard to his own conduct or duty in furnishing a seaworthy ship and in being personally without knowledge or privity of the debt, embezzlement, loss, damage, etc., which furnishes the basis of the proceeding and against which the limitation is sought. Opposing this contention appellee insists that the petitioner in every case must first show that it or he was without privity or knowledge of the facts or circumstances upon which the debt, demand, injury or tort rests.

The statute limiting liability is—R. S. 4283:

"The liability of the owner of a vessel * * * * for loss * * * * occasioned or incurred without the privity or knowledge of such owner * * * * shall in no case exceed," etc.

The statute was passed for the protection

against losses greater than the value of the owner's ship. The right was based on the owner's lack of privity or knowledge of the circumstances of the disaster.

Congress attached one condition and the general maritime law imposed the other. Congress made it a condition precedent to this relief that the owner should be without privity or knowledge of the circumstances of the loss. The maritime law and the navigation laws required of the owner that he must furnish a seaworthy vessel properly equipped and manned or he could not limit. The maritime law by implication said that the owner could not be without privity or knowledge of the condition of his ship at the commencement of the voyage.

This is what the maritime law, the United States Navigation laws and the section 4283 exacted of the owner in exchange for the limitation privilege.

The court is without jurisdiction to entertain a petition unless the petitioner alleges lack of privity and proves it.

The act although not to be construed so as to defeat its beneficial purpose is in derogation of existing legal rights and remedies and so is strictly construed.

The Supreme Court so held in the case of *The Main vs. Williams,* 152 U. S. 122—38 L. Ed. 381 at 385.

"The English Courts have held, very properly we think, that these statutes should be strictly construed. As observed by Abbott, Ch. J., in *Gale v. Laurie,* 5 Barn. and C. 156, 164: 'Their effect, however, is to take away or abridge the right of recovering damages, enjoyed by the subjects of this country, at the common law, and there is nothing to require a construction more favorable to the ship owner than the plain meaning of the word imports.' To the same effect are the remarks of Sir Robert Phillimore in *THE ANDALUSIAN,* 3 Prob. Div. 182, 190, and in *THE NORTHUMBRIA,* L. R. 3 Adm. 6, 13. Speaking of this statute, Lord Justice Brett in *Chapman vs. Royal Netherlands Steam Navigation Co.,* L. R. 4 Prob. Div. 157, 184, remarked: 'A statute for the purpose of public policy, derogating to the extent of injustice, from the legal rights of individual parties, should be so construed as to do the least possible injustice. This statute, whenever applied, must derogate from the direct right of the ship owner against the other ship owner, * * * * It should be so construed as to derogate as little as is possible consistently with its phraseology, from the otherwise legal rights of the parties'."

From the language of the Act, the right to limit is made to depend upon this particular condition, viz.—was the owner without privity or knowledge? If he was he may limit; otherwise he cannot.

The arrangement of the text makes the privity or knowledge of the owner a condition precedent to the grant of the right. We need not look beyond the language of the text. If we disregard, however, the particular text arrangement and ex-

amine the limitation statutes with reference to their purpose, the rights they create, and the condition of the claimants and shipowner at the common law is considered apart from the proceeding in admiralty which permits him to limit in certain cases, it is clear beyond any question that the first inquiry in a limitation proceeding is whether the owner is without privity or knowledge in all cases where the allegation of the petition as to the lack of privity or knowledge is denied by the answering claimant.

The petitioner here was sued in the State Court for damages for personal injury. Plaintiff in that court under the "Saving Clause" of the Federal Judiciary Act was entitled to a jury trial.

To defeat this right of jury trial in the State Court petitioner filed its limitation petition and contended below, as here that it is entitled by the mere filing of its petition and the taking of the attendant formal steps as to appraisal, etc. to have the United States District Court sitting in Admiralty first pass on the merits of Appellee's pending case in the Superior Court of Washington for King County, to-wit: the questions of negligence and damage, before considering the question whether petitioner is entitled to limit his liability.

In other words petitioner would prevent a jury trial and substitute for a verdict on the issues of damage and negligence the opinion and judgment of a Federal Judge, before he makes the neces-

sary showing in the matter of privity and knowledge.

And if Appellant's position is sound it can compel the claimant to litigate the question of negligence and damage or the circumstances of the breach of contract, debt, default or tort against the ship owner before ever considering the shipowner's right to limit liability. If this is the law a beneficial statute designed for relief of shipowners in certain cases where great hardship would otherwise occur, has become the instrument of designing owners to defeat trials by jury and to compel the adjudication of all claims, demand, debts, embezzlement, breaches of contract and non-maritime torts, etc., in the United States District Court in Admiralty instead of allowing a proper adjudication of such cases before a State Court under the Savings Act, unless the vessel owner brings himself within the limitation statute by showing his lack of privity or knowledge.

The grant of judicial power to the United States was extended to all causes "of admiralty and maritime jurisdiction" by the Constitution. Congress, however, in 1789 in the first judiciary Act preserved to suitors in maritime causes a remedy at common law where the common law was competent to give it. The reason for this failure to take all maritime causes away from the State Courts is clear. The people of the colonies had surrendered reluctantly to Federal control. They

had confidence in their own sovereign courts and were uncertain and doubtful of the new jurisdiction of the National government. The first congress ~~in conferring~~ granted the right to litigate maritime cases in the State Courts in all cases where the common law was competent to afford a remedy and it always had been competent to litigate maritime causes in tort or contract in the colonial courts and in the courts of Kings Bench in England as long as they remained transitory actions between persons and did not attempt to proceed in *rem* against the vessel.

And Congress has not changed the Act in this respect. It still believes that litigants should prosecute admiralty and maritime causes in the Courts of the state before juries rather than in the Federal Court before an admiralty judge if the litigant so desires. See Judicial Code Sec. 24, Sub. Div. 3.

And this right cannot be taken away by the artful device of filing a limitation proceeding in the United States Court, so that the national court will hear and determine the question of liability, negligence, damage or debt as the case may be, quite without regard to the question of the petitioner's lack of privity or knowledge.

The error in the Bouker case is apparent when we apply the limitation statutes of today to a non-maritime tort or claim. The limitation sections now cover such cases. See *Richardson vs. Harmon,* 222 U. S. 96, 56 L. Ed. 110.

What then must follow where a limitation proceeding is brought upon a non-maritime claim if the Bouker case idea is carried out? The District Court gravely sits to hear a case in which it has no possible jurisdiction but for the fact that a petition has been filed in the admiralty asking for a limitation. It proceeds with equal gravity and deliberation to pass upon and determine the merits of a non-maritime claim in which there is not even a concurrent jurisdiction in the Federal Court. The non-maritime tort is before the court merely because it is an incident to a special jurisdiction taken out of the "Savings Clause" and conferred exclusively upon the District Court for the benefit of the American ship-owner, to relieve him from hardship or disaster at sea when he, the ship-owner, has shown himself to be without privity to the disaster.

The underlying thought in limitation statutes which prompted their enactment here and in other countries was—if the ship-owner has furnished a seaworthy ship, properly equipped and manned and has sent her out on the high seas where he cannot maintain or exercise that control over his plant, works, ways, machinery or employees which a master or proprietor can and does upon land where the whole enterprise is open to his inspection and control day or night, he, the ship-owner, ought to be relieved of the effects of a maritime disaster which might otherwise overwhelm him.

And to obtain the benefit of this special, and

we insist, limited jurisdiction in the United States District Court the petitioner may stop all other proceeding by his petition in the district court to obtain this special relief, but he may not get this relief until he has shown himself to be within the small class of special persons entitled to it, viz.: those who, owning ships, are sought to be made liable for an amount greater than the value of their vessel and they (the owners) are without privity or knowledge of the causes of the disaster.

Otherwise the District Court in admiralty can be made to hear all cases against ship-owners provided only the amount demanded is greater than the appraised value of the ship and covers a liability, maritime or non-maritime, as the case may be, arising or incurred during a voyage.

Carrying out the plan upon which appellant contends should be followed, in the case at bar, it argues the question of negligence and attempts to its own satisfaction to demonstrate that as petitioner was not negligent in the premises it is entitled to limit liability as a matter of right in the District Court.

In answer to this claim appellee contends that inasmuch as the proximate cause of the injury is and was a condition of the hull which the owner was at all times since the vessel was built, privy to and of which appellant had full knowledge, it cannot limit and the court is without jurisdiction to go further.

In the language of Judge Bourquin:

> "Now in the instant proceedings it is very clear that if claimant is entitled to recover it is because of a condition of the hull of the vessel, which was actually created and maintained by petitioner."

It is idle to argue that petitioner was not privy to and had no knowledge of the actual occurrence. The petitioner was operating a vessel which it had built and maintained in the passenger service upon the navigable waters of the State for many years. The proximate cause of the injury was alleged to be the defective build and construction of the platform. This allegation was proven at the trial below. In fact, the pleadings admit it.

Plaintiff sitting in a seat which was one of several in narrow rows, fell into the aisle from the platform where the seats were located while attempting to leave the seat when the vessel came to land. The issue of negligence was whether the construction of the seats on a raised platform above the center was a defect in the hull of the vessel within the meaning of Section 4493 of the Revised Statutes, and its maintenance in that condition a breach of the high duty owed by the carrier to use the greatest care in carrying passengers under the general law.

Such it was—this very physical condition which was made the basis of complaint in the state court was created by the act, design, intention, privity and knowledge of the owner-petitioner and it is not

open to any possible claim or suggestion to the contrary. This brings us back again to the inquiry—Can the petitioner deprive appellee of her right to submit this question of vessel construction and maintenance of passenger accommodations as a condition of negligence or non-negligence, as the case may be, to the judge and jury of the state court?

The state court might do several things in the case if it should be submitted to it. It might grant a non-suit because it might decide as a matter of law that it was not such a defect in the hull of a vessel as to bring the case under R. S. 4493. It might hold the appellee plaintiff guilty of such gross or willful negligence as to defeat her claim entirely, notwithstanding the defective condition of the vessel. It might divide the damages as a matter of law or it might submit the whole issue to a jury but *inasmuch as the very condition alleged to have caused the injury* in violation of a carrier's duty to a passenger and in disregard of the duty imposed upon a vessel owner by Section 4493 R. S., was created by the petitioner, would on the face of the proceeding preclude the petitioner from relief in the District Court when the right to limit is denied by claimant.

We might add further such a procedure would impose an endless burden upon the District Court, all of which could be avoided by directing the first inquiry to the question of privity or knowledge.

The point under consideration has been settled

in appellee's favor by the District Court in *The Erie Lighter,* 108, 250 Fed. 490 at 493, where the court said:

> "It is necessary, primarily, to determine whether the petitioner is entitled to limit its liability. If it is, this court may undoubtedly proceed to determine whether it is liable at all, and if so, to fix and assess the damages that should be awarded to the claimant. That is what the Supreme Court rules sought to accomplish. *The Benefactor,* 103 U. S. 239, 26 L. Ed. 351; *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.,* 109 U. S. 578, 592, 595, 602, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038; *Butler vs. Boston S. S. Co.,* 130 U. S. 527, 552, 9 Sup. Ct. 612, 32 L. Ed. 1017; *White vs. Island Transportation Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993; *The Annie Faxon* (D. C. Wash.), 66 Fed. 575, 577, affirmed 75 Fed. 312, 21 C. C. A. 366 (C. C. A. 9th Cir.); *Quinlan vs. Pew,* 56 Fed. 111, 5 C. C. A. 438 (C. C. A. 1st Cir.). On the other hand, if the petitioner may not avail itself of the limited liability statutes, it would seem, both on authority and reason, that, at least without claimant's consent this court is without jurisdiction to proceed further but must dismiss the proceeding, leaving the claimant free to pursue his remedy in the courts of New Jersey. It was expressly so held by the Circuit Court of Appeals of the First Circuit in *Quinlan vs. Pew,* 56 Fed. 111, 5 C. C. A. 438. Such also is the necessary conclusion to be drawn from the disposition which was made of such proceedings, when the owners were held not to be entitled to limit their liability, in *Weisshar vs. Kimball S. S. Co.,* 128 Fed. 397, 63 C. C. A. 139, 65 L. R. A. 84 (C. C. A. 9th Cir.); *Parsons vs. Empire Transp. Co.,* 111 Fed. 202, 49 C. C. A. 302 (C. C. A. 9th Cir.); *In re Myers Excursion & Navigation Co.* (D. C. S. D. N. Y.), 57 Fed.

240, affirmed sub nom. *The Republic,* 61 Fed. 109, 9 C. C. A. 386 (C. C. A. 2d Cir.). It was also held in *The Dauntless* (D. C. N. D. Cal.), 212 Fed. 455, affirmed sub nom. *Shipowners' & Merchants' Tugboat Co. vs. Hammond Lumber Co.,* 218 Fed. 161, 134 C. C. A. 575 (C. C. A. 9th Cir.), that, where there is but a single claim and the value of the vessel exceeds the amount of the claim, the petition for limitation of liability should be dismissed and the claimant permitted to prosecute his action in the state court. A person who has a cause of action of admiralty cognizance has always been entitled to seek his remedy in either the common-law courts, where they are competent to give it, or in the admiralty courts (Judiciary Act of 1789, Sec. 9, 1 Stat. L. 76; Judicial Code of 1911, Secs. 24, 256 (Comp. St. 1916, Secs. 991, 1233).

It is not to be presumed, therefore, that the Supreme Court, in adopting the rules of practice for limited liability cases, intended to override the provisions of the last mentioned statutes in cases where there was no right in an owner to limit his liability. The purpose of the rules is set forth in *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co., supra,* 109 U. S. at 594, 3 Sup. Ct. 379, 617, 27 L. Ed. 1038. It is true that rule 56 permits an owner to assert, not only his right to limitation of liability, but also his exemption from all liability; but this was incorporated, as pointed out in that case and in *The Benefactor, supra,* to overcome the hardship of the English rules of practice which required an owner, seeking the benefit of the limited liability law, to first confess general liability. The only ground for an owner to come into admiralty is because of his asserted right to limit his liability. If it is found that he is not entitled to that right, for the court to go further and determine general liability, etc.,

> would be to deprive a claimant of the choice of forums given to him by the statute and deprive him of his right to trial by jury. This is an important consideration, as a great many limited liability cases, since the decision in *White vs. Island Transp. Co.,* 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993, deal only with a single claim arising out of personal injury."

In re *Pacific Mail S. S. Co.,* 130 Fed. 76 at 80, 9th Circuit, this court recognizes this principle. The court below limited liability. Each side appealed. Claimant contended that petitioner was not entitled to limit because of unseaworthy ship. Petitioner was not satisfied with the limitation decree, and appealed to obtain a greater limitation. This court denied the right to petitioner to limit at all and reversed the lower court because the petitioner had not furnished a seaworthy ship properly manned, and was privy to the cause of disaster. Judge Ross said in speaking of the question of the right to limit:

> "It is apparent that, if this position of the claimants is well founded, the petitioner is not entitled to any limitation of its liability, the questions presented on its appeal become immaterial, and the claimants to whom damages were awarded by the court below will be entitled to judgment for the full amounts so awarded them, together with their costs, whether the voyage on which the disaster occurred should include the round trip from San Francisco to Hongkong and back, as contended on the part of the claimants, or is limited to the return trip from Hongkong to San Francisco, as contended on the part of the petitioner."

Finally there is a statement in the opinion in *Richardson vs. Harmon, supra,* which adds strength to our position.

The court in discussing section 18 of the Act of June 26th, 1884, refers to the state of the law before its enactment where it held there was no jurisdiction in the District Court to try a case of fire on land communicated by the ship or from a collision between a ship and a structure on land. The court said:

> "The tort in both cases would have been non-maritime."

The court then concludes that the necessary effect of Section 18 of the Act of June 26th, 1884, was to extend the right to limit liability for every kind of loss, damage and injury but adds with considerable emphasis, we think, a statement sustaining our view of the Act—we quote from *Richardson vs. Harmon,* as follows:

> "Neither is it necessary to conclude that the section (Sec. 18, Act of June 26th, 1884) in question is a repealing act as to any of the qualifications of the preceding limitations found in Sections 4283 et. seq. of the Revised Statutes. To so hold would be to attribute to Congress a wider purpose than we have any reason to suppose—that of extending the benefit of Sections 4283 et. seq. *regardless of the owner's knowledge or privity.* That would be to throw the section out of correspondence with the existing limitations."

We have underscored the language *"regardless of the owner's knowledge or privity,"* for it clearly

appears that petitioner may get the benefit of the limitation act regardless of its privity if appellant can induce this court to follow its procedure contended for, viz.: to try the issue of negligence or defective hull in this court before establishing its right to limit because of its lack of privity or knowledge of the condition causing the appellee's injury, thereby depriving us of the right to trial by jury.

We therefore respectfully submit that this court is without jurisdiction to proceed further because of the obvious privity and knowledge which appellant had of the very condition which proximately caused her injury. The judgment of the District Court should be affirmed.

ARGUMENT ON MERITS.

Without prejudice to our cause as pleaded and argued wherein we deny the right of the District Court and of this court to hear the cause on its merits or to make any adjudication as to the negligence or non-negligence of the owner and claimant, or to consider the case further, we, of course, recognize the jurisdiction of this court to deal fully with every phase of this case if on the record the court can uphold appellant's plan of procedure or it can say as a matter of law, that the appellant was without privity or knowledge of the cause of appellee's injury.

The Liability of Appellant.

The first inquiry on the facts is—

What was the proximate cause or causes of the injury? It clearly appears that there were two, the principal one being the defective condition of the hull and the other the failure to place warning signs in and about the cabin and seating place.

The primary and principal cause was the defective and unseaworthy condition of the hull in its adaptation to the passenger service, although there was also a failure on the part of the petitioner to warn its passengers of this condition and this failure consistently followed on the part of the appellant, for many years was a grave breach of duty which was sufficient to hold the appellant when we consider the obligation which the carrier of passengers assumes with respect to its passengers. In neither one of these situations could petitioner limit because each was of long standing with the full knowledge of privity, and active consent and approval of appellant.

The Facts.

Mrs. Harvey was 75 years of age when she went on board the appellant's vessel at Seattle to be carried as a passenger across Puget Sound to Manitou Beach, paying the regular tariff fare enacted by appellant for such transportation. She went to the ladies' cabin, a photograph of which is Petitioner's (appellant's) Exhibit 2, page 108 of

apostles on appeal brief. She occupied a seat which was furnished for her accommodation. This seat, as shown by the photograph, was placed at the edge of the platform which was raised about ten inches above the floor of the aisle. The seats were of the public hall type, metal seats in narrow rows, seating two persons in each row on each side of the aisle, the rows extending at right angles to the keel. These rows were twenty-nine inches apart. The appellee entered the seat, remained there during the trip or run, which took about an hour. In attempting to leave her seat, and while rising and stepping from her seat ino the aisle she fell forward and downward to the aisle floor, sustaining very severe injuries. Her act was due to her momentary forgetfulness. She occupied an aisle seat, to use a theatre box office term. No step or ledge was provided to step on after leaving the seat. A sheer drop of ten inches was within an inch or two of the passenger's foot after the passenger had risen in the seat for the purpose of stepping out from between the seats. In stepping out from the seats, the passenger had at all times to remember that the sheer drop of ten inches was within an inch or so of his foot, even if he wasn't standing on the edge of the platform. True enough, if one charged his or her memory with the fact of the drop and cautiously stepped out from the seats with due regard for the drop and carefully stepped down from the seat platform to the aisle there was no danger. But is a passenger to be on his guard at all times

when using a part of the vessel especially set aside for his or her use and convenience? Momentary forgetfulness is excusable in these circumstances. There was much to engage one's attention in looking out on the water. Much stress was laid on the view obtained by raising the seat platform. The matter of the use of the seat and momentary forgetfulness is emphasized when we consider the appellee's age and the fact that her long skirts and long heavy coat (this lady was not of the ultra modern kind in her dress) tended to obscure the sheer drop at the seat edge, and the narrow space between the seats, all of these factors favor the contention that it was not a gross or even unexcusable fault on part of appellee. A cautious person acting with due regard to her own safety might have suffered a similar injury in leaving the seat.

~~Marine~~ Carriers of Passengers.

Can there be any doubt as to the fault of the owner of the vessel?

In answering this question we must keep in mind first that in this case there is no rule of contributory negligence which operates as a bar to a recovery.

This case whether tried in a state court under the Saving Clause or in admiralty is a maritime case, based on a maritime tort. The rule of divided damages must apply. In other words as in a collision case fault is either sole or mutual.

Disregard the question of appellee's fault. Was the petitioner not at fault in providing a structure which would permit one to fall in such a manner? In answering this question much depends upon the use of the platform and the duty imposed upon the owner of the vessel by our navigation laws. The pertinent parts of section 4493 of the Revised Statutes is—

> "Whenever damages is sustained by any passenger from explosion, fire, collision or other cause the master and the owner of such vessel * * * shall be liable to each and every person so injured to the full amount of damage if it happens * * * through known defects or imperfections of the steaming apparatus or of the hull."

The statute is only declaratory of the common law and the maritime law. The common law obligation is expressed clearly and simply in *Pennsylvania Company vs. Roy,* 102 U. S. 12 Otto, 451 and 26 L. Ed. 141, as follows:

> "These and many other adjudged cases, cited with approval in elementary treatises of acknowledged authority, show that the carrier is required, as to passengers, to observe the utmost caution characteristic of very careful, prudent men. He is responsible for injuries received by passengers in the course of their transportation which might have been avoided or guarded against by the exercise upon his part of extraordinary vigilance, aided by the highest skill. And this caution and vigilance must necessarily be extended to all of the agencies or means employed by the carrier in the transportation of the passenger. Among the

duties resting upon him is the important one of providing cars or vehicles adequate, that is, sufficiently secure as to strength and the other requisites, for the safe conveyance of passengers. That duty the law enforces with great strictness. For the slightest negligence or fault in this regard, from which injury results to the passenger, the carrier is liable in damages. These doctrines to which the courts, with few exceptions, have given a firm and steady support, and which it is neither wise nor just to disturb or question, would, however, lose much, if not all, of their practical value, if carriers are permitted to escape responsibility upon the ground that the cars or vehicles used by them and from whose insufficiency injury has resulted to the passenger, belong to others."

The duty to use the utmost care, so far as human skill and foresight can go rests upon the carrier of passengers. See *"Carriers,"* R. C. L., Sec. 582. The duty of all common carriers to provide passengers with usual reasonable accommodations includes furnishing seats. See *Carriers,* 4 R. C. L., Sec. 526.

"As far as human care and foresight can go," is a familiar form of stating the duty. *Stokes vs. Saltonstall,* 13 Peters 181, 10 L. Ed. 115.

See also *Shoemaker vs. Kingsbury,* 79 U. S. 12 Wall 369, 20 L. Ed. 432.

The rule laid down in 10 *Corpus Juris* 854 was adopted by this court in the *Korea Maru* in 254 Fed. 397 as furnishing a comprehensive statement of the duty which a carrier owes to a passenger.

In an earlier case, *The Oregon,* 133 Fed. 609, this court examined the question at length and held the owners to a very high degree of care.

The Maritime Carrier.

The Oregon, supra, is also authority for the statement that the maritime law imposes the same high degree of care respecting the duty to the carrier and the kind of ship it shall furnish for the carriage. This court said in the *Oregon* case:

> "In the leading case of *Stokes vs. Saltonstall,* 13 Pet. 181, 191, 10 L. Ed. 115, the distinction between these two classes of contracts is stated by the Supreme Court of the United States as follows:
>
> 'It is certainly a sound principle that a contract to carry passengers differs from a contract to carry goods. For the goods the carrier is answerable, at all events, except the act of God and the public enemy. But although he does not warrant the safety of the passengers at all events, yet his undertaking and liability as to them go to this extent: that he or his agent, if, as in this case, he acts by agent, shall possess competent skill; and that, so far as human care and foresight can go, he will transport them safely.'
>
> In the case of the *Liverpool Steam Co. vs. Phenix Ins. Co.,* 129 U. S. 397, 440, 9 Sup. Ct. 469, 471, 32 L. Ed. 788, Mr. Justice Gray, speaking for the court, refers to this distinction in the following language:
>
> 'The fundamental principle upon which the law of common carriers was established was to

secure the utmost care and diligence in the performance of their duties. That end was affected in regard to goods by charging the common carrier as an insurer, and in regard to passengers by exacting the highest degree of carefulness and diligence.'

Among the implied obligations assumed by the carrier of goods by sea is the warranty of the shipowner that the vessel in which the goods are carried is in a seaworthy condition when she commences her voyage. In this warranty the ship owner undertakes responsibility for any defects in the ship or her machinery or equipment, even for defects not discernible by careful examination. *Carver's Carriage by Sea,* Sec. 17.

In *Work vs. Leathers,* 97 U. S. 379, 24 L. Ed. 1012, the Supreme Court stated the rule to be as follows:

'Where the owner of a vessel charters her or offers her for freight, he is bound to see that she is seaworthy, and suitable for the service in which she is to be employed. If there be defects known or not known, he is not excused. He is obliged to keep her in proper repair, unless prevented by perils of the sea or unavoidable accident. Such is the implied contract where the contrary does not appear.'

In the *Edwin I. Morrison,* 153 U. S. 199, 210, 14 Sup. Ct. 823, 825, 38 L. Ed. 688, the language of Mr. Justice Gray, delivering the opinion in the same case in the Circuit Court, was quoted with approval, to this effect:

'In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of the beginning of her voyage, and not merely that he does not know her to be unseaworthy, or

that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is or shall be in fact seaworthy at that time, and does not depend on his knowledge or ignorance, his care or his negligence.'

This statement of the rule is again quoted and reaffirmed in *The Caledonia,* 157 U. S. 124, 130, 15 Sup. Ct. 537, 39 L. Ed. 644.

The carrier of passengers, either by land or sea, does not assume this responsibility. *Abbott's Law of Merchant Shipping* (13th Ed.) p. 208; *McPadden vs. New York Central R. R. Co.,* 44 N. Y. 478, 4 A. M. Rep. 705; 5 *Am. & Eng. Enc. of Law* (2d Ed.) 480; 6 *Cyc.* 591. But, instead of this warranty, he is held to a very high degree of care, prudence, and foresight. When a carrier undertakes to convey persons by the powerful, but dangerous, agency of steam, public policy and safety require that he should be held to the greatest possible care and diligence. The personal safety of the passengers should not be left to the sport of chance or the negligence of careless servants. Any negligence in such a case may well deserve the epithet 'gross'. *Philadelphia & Reading R. R. Co. vs. Derby,* 55 U. S. (14 How.) 468, 485, 14 L. Ed. 502."

The maritime law requires the shipowner in cargo cases to furnish a seaworthy ship properly manned and equipped. There is an implied warranty in every undertaking respecting the cargo. In the carriage of passengers while there may be no technical warranty, the high duty of doing the utmost for the safety and protection of the passenger which human skill and endeavor can do or suggest is the fair equivalent of the implied warranty and fitness in cargo cases.

And this high duty to passengers extends to the ship and her appurtenances and fixtures. And if there were a doubt about it, Congress has given the traveling public on American ships the definite assurance that seaworthy hulls free from defects and imperfections shall be used.

At least the ship owner will use defective or imperfect hulls at his peril because of section 4493.

And if the shipowner does not furnish a seaworthy ship properly equipped and manned he may not have a limitation which is but another way of saying that section 4493 bars the shipowner from limitation relief. There is only one qualification to this statement. The Supreme Court having said that sections 4283 and 4493 are to be understood together and that one does not repeal the other, it is probably correct to say that the shipowner who furnishes a vessel which is defective or imperfect in some particular may still limit his liability if he is without privity or knowledge of the defectve condition.

This distinction is made in the *Annie Faxon* case, 75 Fed. 312, in this circuit. There are not many cases where the owner will be able to escape the consequences of defective hulls and boilers. He did so in the *Faxon* case, and the special circumstances of the case may relieve owners in other cases.

It is difficult to perceive a situation where the owner can design, build and for ten years maintain

a vessel in a defective condition and escape the effect of the requirement that he shall be without privity or knowledge of the defective condition which has caused the injury.

In view of these rules, shall the owner in this case be discharged from liability and held blameless?

If so, then the words of the statute "known defects and imperfections" have little meaning or weight. Why was the word "imperfections" added to the word "defects"? Why was it stated disjunctively if not to cover different classes and yet not defective. It must have been understood in Congress as covering not only defective hulls, but those which because of poor adaptation or lack of fitness for the particular trade or use were insufficient or imperfect. In other words, if a passenger is injured and this injury happens through the use of an imperfect hull which was so known to the owner he shall be liable for the full amount of such damage, according to the mandate of the statute.

In the instant case, the passenger was injured because she forgot momentarily to step down from the platform upon the edge of which the seat rested. If the seats had been placed on the same level as the aisle the injury would not have occurred in the manner in which it is known to have occurred, without regard to the state of mind of the passenger, i. e. without regard to whether she was free from culpable fault. It did happen because the passenger not remembering for the time being the

sheer drop from the seat plaform to the floor of the aisle stepped into space instead of upon a firm and safe foundation. The drop, the size of the seats, the lack of space between rows, the long clothing, the failure to warn, all unite to establish a condition of trap and danger. Is the maintenance of such a condition consistent with the statute? Is it consistent with that high degree of care the carrier is required to exercise? Is it using the highest degree of care that human foresight can use or prudence can suggest to guard the passenger against injury or damage? Is it furnishing a ship which had her cabin seats and floor *perfectly* arranged? Is it furnishing a ship fit for the purpose intended, viz: the safe carriage of passengers? Is such a ship so poorly adapted to the carriage of passengers seaworthy? Does not the occurrence of the injury in itself furnish a negative answer to these inquiries?

Such a condition is condemned by nearly all of the safety standards adapted by the Public Service Agencies in the country. Floors and hallways, walking or working places shall be on the same horizontal level.

SUMMARY.

In concluding our argument before making a brief statement as to appellant's authorities we urge the court—

To dismiss the appeal and affirm the decree of the court below because,

;——The record shows conclusively that the efficient and proximate cause of appellee's injury was due to the physical condition of the vessel which appellant created and had for years knowingly and intentionally maintained.

In these circumstances appellant was not without privity or knowledge and could not therefore limit its liability.

;——The record conclusively and affirmatively showed appellant's privity and knowledge.

;——Appellant failing to show lack of privity and knowledge cannot have a limitation of liability without regard to the principal question of negligence or *defective or imperfect hull.*

The court below as here is without jurisdiction to pass upon or make any adjudication as to negligence in the absence of a showing as to lack of privity or knowledge.

Appellee when not submitting to the jurisdiction of this court cannot be deprived of a jury trial in the state court until the petitioner for limitation among other jurisdictional requirements can show lack of privity or knowledge.

If a Limitation Is Granted.

Even assuming for the sake of argument that the court might require proof of negligence, along with the question of privity, etc., considering the state of the law and the specific requirement of the statute, gross negligence was shown, viz:

a. The injury would not have happened in the manner it did happen except for the sheer drop from platform to aisle, and the narrow seats placed on the edge of the platform.

b. The failure to warn of a condition of inherent or potential danger.

If in any circumstances the court can grant a limitation, the court surely cannot excuse and relieve the carrier,—even if appellee was herself partly at fault, because the law of divided damages applies. To hold otherwise is to say that there was nothing of an imperfect or defective condition in the arrangement of the floor and seats notwithstanding this very condition caused the appellee to fall, break her hip and sustain permanent severe injuries.

All of these suggestions are without prejudice to our position that quite without regard to the question of negligence or defective or *imperfect* hull this court was without jurisdiction to proceed further when it appeared that appellant created the very condition which proximately caused the injury.

DIVIDED LIABILITY IN MARITIME CASE FOR DAMAGES.

The division of damages plays an important part on the question of negligence. The carrier cannot escape even if the passenger was guilty of negligence if the carrier's negligence operated as a contributing fault.

The court is entirely familiar with the rule of divided damages as laid down in the *Max Morris,* 137 U. S., 34 L. Ed. 586, and followed many times since. The only question is, does it apply as well to the relation of carrier and passenger as to stevedore and ship.

In *The Tourist,* 265 Fed. 700, in the District Court of Maine, Judge Hall thought it did, saying:

> "I do not find any cases reported where the rule has been applied in case of injury to a passenger on a ship. But I can see no reason why it shall not be so applied. In such cases the reasoning of Judge Addison Brown is clearly applicable, and the decisions admiralty courts have sustained his conclusion, that the 'public good is clearly best promoted by holding vessels liable to bear some parts of the actual pecuniary loss where their fault is clear provided that the libellants fault though evident is neither wilful, nor gross, nor inexcusable.' "

In the later case of *The North Star,* decided June 23rd, 1925, reported in 1925 Amc. 1085, the damages in a passenger and carrier negligence case were divided by the District Court of Massachusetts.

ANSWER TO SPECIFIC STATEMENTS OF APPELLANT.

Appellant states that petitioner's witnesses all stated that the Suquamish was built like all other vessels of her class. This statement is not borne out by the record.

In cross examination by Mr. Martin at pp. 46 and 47, L. H. Collidge said:

"Q. How many vessels of this type are on the Sound?

A. I could not say.

Q. Somewhere around a hundred?

A. Possibly so. (See page 47 Tr.)"

When asked to name vessels of the Suquamish type which had a center aisle with a raised seat platform ten inches on each side, Mr. Collidge answered "Three, I believe." (See Tr. p. 46.)

Frederick S. Brinton named three vessels of the Suquamish size and type which had the raised platform and sunken aisle. He was asked:

"Q. There are several of the small vessels 60 to 100 feet long on the Sound?

A. A large number, yes." (See Tr. p. 53.)

Taylor, for petitioner, when cross-examined admitted there were many vessels of the Suquamish type on the Sound but could only name three with the sunken aisle and raised seat platform. (See Tr. pp. 57, 58 and 59.)

J. L. Anderson, for appellant, at p. 62 Tr., said there were a great many vessels of the Suquamish type operating in the passenger service on the Sound.

"Q. You find as many one way as you will the other?

A. Yes."

These questions and answers furnish a complete denial of the claim that the Suquamish was built with sunken aisle and raised platform for seats in conformity with an established type of construction in those particulars.

It would have been easy to show this fact if it was true that the sunken aisle with raised seat and platform on each side was a common type. Appellant's witnesses named three out of a large number, which was said by one of its witnesses to be possibly 100.

It says that the cabin floor, aisle and platform was not part of the hull. It surely wasn't part of the engine, masts or rigging.

Appellant in drafting its petition was evidently not familiar with the terms of R. S. 4493, and did not appreciate the importance of making it appear that the sunken aisle and raised seat platform were not part of the hull, for it alleged in the petition for a limitation of liability in paragraph II, page 6 of the Transcript of Record—

"A suit thereupon has been brought as hereinafter more fully set forth on account of defects in the said vessel * * *."

In the next following paragraph (p. 6 Tr.), numbered III—

"That the said defects complained of in the

said vessel were *in truth and in fact a part of the original structure of said vessel* and were at all times visible to anyone in the cabin."

Mr. B. S. Murley, secretary and treasurer of appellant, swore to the petition (see p. 9 Tr.) before Mr. Beyers, who now contends so strenuously to the contrary for his client.

Whom shall we believe?—the naval architects in appellant's employ who so glibly testified that the floor and platform were not part of the hull? May we not rely on the sworn petition to the contrary aided by what is apparent in the photograph? It is idle in the extreme to argue that the very platform supporting seats and passengers which is fastened securely to cross timbers resting on the vessel's frames is not a part of the hull,—this contention is unworthy of serious thought.

It seems equally unworthy of reply to say that a warning notice posted in the cabin with appropriate words of warning calling attention to the sheer drop from platform to the aisle would not have given some aid to passengers.

The Cases Cited by Appellant.

Johnson vs. Port Washington Route, 121 Wash. 460, was not a maritime cause. It was an appeal from a judgment of non-suit which was affirmed. The presence of contributory negligence presupposes negligence of defendant. There can be no contributory negligence without primary negligence. In ad-

miralty, the damages would have been divided. It was non-maritime, for it occurred on a wharf. The court also observed:

> "There were no attendant circumstances which would distract her mind and cause her not to notice the distance between the end of the plank and the floor of the dock."

In the case at bar there were attendant circumstances such as—One hour's rest in a seat—the narrow rows—Mrs. Harvey's long coat and dress—the things of interest to be seen by looking out on the Sound, etc.

Dunn vs. Kemp & Hebert, 36 Wash. 183. In that case a customer was injured in a store by stepping into an open stairway. It was wholly different from this case. The customer openly walked into the stairway, wearing colored glasses to protect her eyes from light. The standard of care was different —ordinary care was the test.

Hollenback vs. Clemmer, 66 Wash., and *Hogan vs. Building Co.,* 120 Wash., are also widely different and beside the point here. Liability in each was measured by ordinary care. No statute appears to have attempted to regulate liability by punishing in damages any departure from the standard of a *perfect-non-defective place.*

The hull, under R. S. 4493, must be without *defect* or *perfect,* for if imperfect, or if it had imperfections, which is the word of the statute, the owner is liable.

Finally, appellant argues that appellee submitted the whole question of negligence to the District Court.

This we strenuously deny. In paragraph 6, page 14 of the Transcript, claimant (appellee) set forth that she did not intend to confer jurisdiction upon the District Court to hear the case upon its merits because of her desire to try the pending case against the company in the Superior Court of King County, Washington. In her prayer to her answer, page 17 Tr., appellee said:

> 1. "That said limitations be disallowed for the reasons herein set forth."
>
> At page 67, MR. MARTIN: "Your Honor, I think to shorten this matter and save time the best way would be to go right through with the case.
>
> THE COURT: I am not familiar with the statute here. Suppose the petition for limitation is denied, will the case be tried here on its merits?
>
> MR. MARTIN: I understand the practice to be that if the petition for limitation of liability fails the case is dismissed and we are permitted to proceed with our cause of action in the state courts." See Tr. 67, 68.

At pages 90, 91, the claimant (appellee) moved for a dismissal of the petition. At page 97, appellee again renewed her motion to deny the petition for limitation of laibility.

The statutes deal only with the substantive rights. The practice is governed by the rules. Noth-

ing in the rules calls for the making of a motion at the close of petitioner's case at the risk or peril of waiving the right to object to the right to limit. The claimant objected all through the proceedings to the court taking jurisdiction but in the nature of things was compelled to go into the merits as we are here for fear that if the right to limit is granted the claimant must show her right to a recovery because of petitioner's negligence or be foreclosed from any relief. Upon the proof submitted no purpose is shown to confer jurisdiction on the court, but in the orderly presentation of the respective claims and issues on each side appellee was bound to show appellant's negligence and the manner of receiving the injury as bearing on the right to limit as well as the necessity of showing negligence if a limitation should be granted.

Damages.

Items of damage:

Seattle General	$ 561.00
Drs. Dawson and Burch	550.00
Nurse hire	726.00
Ambulance	11.00
Wheel chair	17.50
Medicine	25.00
	$1,890.50

This was up to September 4th, 1924. See Tr. 75.

Since then appellee spent $325.00 for nurse hire

and attendance of a person to help her about, making a total of $2,215.50. Dr. Dawson testified that the charges were the usual and customary charges for services. Mrs. Harvey was injured December 17th, 1923. She sustained a fracture of the left thigh and the left arm above the wrist. See Dr. Dawson's testimony, p. 83 Tr. He said in answer to a question:

> "Q. And did the X-ray confirm the diagnosis as to the fracture in the hip joint and arm?
>
> A. Yes, there was a decided fracture in the hip joint, intracapsular fracture of the bones of the arm, which was very bad.
>
> Q. How long did you continue to treat Mrs. Harvey?
>
> A. Practically until she went back home last summer, she was under my care—sometime in June, 1925."

Mrs. Harvey was in a cast eight weeks and four months in bed before she was able to sit up. She left Seattle in June, 1925, to return to home in the East and was barely able to get to the automobile with assistance.

The injuries were of a permanent character. Her hand and wrist became permanently stiffened. A slight shortening of the leg resulted. The pain and suffering was great.

If the court should take jurisdiction it would ascertain the total injury, however, greatly in excess of the appraised value it might be. It would then

consider the question of mutual fault if any and then would limit the total recovery to an amount which would not exceed the appraisal, viz: $6,700.00. Suit for $12,500.00 was brought against appellant and is now pending in the state court.

We therefore ask:

1. That the decree of the lower court be affirmed.

2. If not, then in the alternative for an award of $6,700.00, which is equal to the appraisal, if a limitation is granted.

Respectfully submitted,

WINTER S. MARTIN,
HERMAN S. FRYE,
CLARENCE L. REAMES,
Proctors for Appellee.

No. 4889

United States Circuit Court of Appeals

For The Ninth Circuit

KITSAP COUNTY TRANSPORTATION COMPANY, a corporation,

Appellant,

—VS.—

ELLA J. HARVEY, Claimant of the Gas Screw "SUQUAMISH," her tackle, apparel and furniture,

Appellee.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HON. GEORGE H. BOURQUIN, *Judge*

REPLY BRIEF OF APPELLANT

BYERS & BYERS, and
JOHN A. HOMER,
Proctors for Appellant.
P. O. Address: 310 Marion Building, Seattle, Wash.

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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION
HON. GEORGE H. BOURQUIN, *Judge*

REPLY BRIEF OF APPELLANT

We do not desire to reply to the brief of the appelee, deeming it unnecessary, further than to review it for the purpose of clarifying confusing or partial statements. We do not think that the appellee has called the attention of this court to any decisions in any way controverting or conflicting with the decisions set forth in our opening brief, which we think amply sustain our contention in regard to the errors set forth. Indeed the brief of counsel for the appellee

is more of an argument as to what he thinks the law should be than what it really is, and either is quite frank or unfortunate in the tacit admissions therein that the law is not in appellee's favor in the instant case.

It is admitted that all preliminary proceedings were properly taken by petitioner to avail itself of its right to limit its liability, including the due appraisement of the vessel and that the same was only of the value of approximately one-half of the claim of the appellee. This removes any applicability of some of the citations of appellee to the instant case. *Shipowners & Merchants Tug Boat Co. v. Hammond Lumber Co.*, 134 C.C.A. 575 is an illustration.

For brevity we follow the arrangement of appellee's argument and call the court's attention to the following points:

I

Counsel for appellant admits (page 3) that the decision of the Circuit Court of Appeals for the Second Circuit in the *Bouker* case supports our contention. That the trial court must find negligence, otherwise there is no claim and the petition for limitation must be granted. But he contends that this is bad law because it compels a claimant to come into the federal court and litigate on the merits "before ever considering the ship owner's right to limitation." As a matter of fact, all parts and phases of such a case are and should be disposed of at one time in one proceeding before one tribunal. Under the law, that tribunal must be a federal court of admiralty. Manifestly the existence or non-existence of negligence is a funda-

mental issue in this class of cases, the determination of which is necessary to a final determination of the proceedings, for, as was said in the *Bouker* case, if there was no fault or negligence for the ship owner to be privy to, there is no liability to be limited and the court should grant the petition.

II

Counsel contends (page 11) that "inasmuch as the proximate cause of the injury is and was the condition of the hull, which the owner * * * was * * * privy to, * * * appellant * * * cannot limit and the court is without jurisdiction to go further." As pointed out in our opening brief, the learned trial judge did not decide what was the proximate cause of the injury, but apparently held, in granting claimant's motion to dismiss, that "if she has any case it is because of a condition of the hull." In other words, the right of a ship owner to limit liability can be precluded by a plaintiff in the state court by alleging that the injury complained of was from negligence because "of a condition of the hull." But, in addition to what has been said in this regard in our opening brief, we call attention to the fact that in the present case the claimant was not content to rest her claim upon the allegation of the structural condition. The step in and of itself was harmless. So, as a second allegation of negligence she charges that the officers of the vessel failed to warn her to step up or down. This is, we submit, an allegation as to the manner in which the vessel was operated. If it states an act of negligence, which, as we believe, it is demonstrated that it does not, it is an act pertaining to the management

of the vessel, not to a known defect of the steaming apparatus or of the hull. Why then should the ship owner be summarily refused a decision on the merits of the petition to limit liability when the allegations of the claimant include matters obviously within the scope of the limitation statue. It is our contention that the right of limitation, through the appropriate proceedings, is open to the ship owner whenever any claim is presented against him regarding which the petitioner apprehends damage beyond the value of his ship. The United States District Court has jurisdiction if any part of the claim is of a nature not excepted from the operation of the act and the mere allegation of exception itself does not preclude jurisdiction. But the court will hear all of the issues and determine (1) whether there be any negligence in the case, and (2) if so, in what regard, that is, whether in the management of the vessel or from defects of the hull, etc., and (3) then whether of the particular negligence established there was any knowledge of the owner.

The above, we think, substantially reviews the brief of the appellee up to "Statement of Facts" on page 19. That statement, we think, is practically correct so far as it goes, though it might be somewhat supplemented. We again call attention to claimant's own testimony where she testifies that she did not look; that she could have seen; that there was absolutely nothing done by the appellant to obstruct her view of the step at all times; that she knew she had to step up and could very plainly see that she had to step down when she left.

On page 22 counsel says:

> "Was petitioner not in fault in providing a structure that *would permit one to fall in* such a manner?"

The same question might be asked in regard to the deck rail over which one could very readily fall into the sea, if he took no care of himself, but over which one is not at all likely to fall if he exercises the usual care. But this question really unmasks the theory of counsel which is that the petitioner was really an insurer of passengers; that it must provide a vessel with equipment that *will not permit any injury to the passenger* unless caused by the passenger's deliberate intent. On page 24, under this heading, counsel discusses matters not in issue, that is, carriers of goods and matters about which there is no dispute so far as carriers of passengers are concerned. We concede it to be the duty of the carrier to exercise the highest degree of diligence and that the marine carrier is not differentiated from other carriers in that respect, so the long and laborious argument of counsel in regard to this matter is quite superfluous.

On page 27 of his brief counsel says:

> "It is difficult to perceive a situation where the owner could design, build and for ten years maintain a vessel in a defective condition and escape the effect of the requirements that he shall be without privity or knowledge of the defective condition which has caused the injury."

In the first place, this is an assumption contrary to the facts or the evidence so far as the instant case is concerned, but an owner would scarcely surmise a

thing to be defective so that it might cause an injury when for those ten years not a single person had been injured by it, though half a million had used it, and thus the longer it was so safely used and the greater the extent to which it was safely used, would not only prevent him from having any knowledge that it was defective, but would cause him to have a fixed and abiding faith that it was in good condition, especially so long, as in the instant case, it is conceded that it was maintained in the same state of repair as when originally installed.

Again on page 29 counsel states:

> "Does not the occurrence of the injury itself furnish a negative answer to these inquiries?"

He is referring to a number of questions he has previously proposed in regard to requirements of the vessel, disregarding the law that the occurrence of an accident in matters of this kind is not any evidence of negligence. But would not the obvious answer be that the use by 500,000 others would be an affirmative answer to his queries?

In his summary on page 30 counsel drops into the rather common fault of stating partial truths. He states that "The record shows that the efficient and proximate cause of the injury was due to the physical condition of the vessel which the petitioner had for years knowingly used and maintained."

The cause of the injury was claimant's carelessness. The physical condition of the vessel was indeed intentionally maintained because it was a proper condition, but as long as the petitioner did not know, not

alone the condition, but did not know that it was improper or defective, it is wholly immaterial so far as the right to limit its liability is concerned. It would be entitled to limit its ability if the vessel were in fact defective, if the defect was unknown to the petitioners. It would be impossible for the petitioner to show lack of privity if it was not shown in this case. All the evidence is to that effect.

IF THE LIMITATION IS GRANTED.

Under this heading, on page 31, counsel states:

"(a) That the injury would not have happened but for the drop from the platform to the aisle;

(b) Failure to warn of a condition."

(a) This may be true. In the same sense, the injury would not have happened had the owner never built the vessel, or never placed seats upon it, or never carried passengers.

(b) The failure to warn has been alluded to heretofore, but we call attention to this—that the appellee had, as a matter of fact, been subjected to just the same kind of danger when she walked up the gangplank to the boat, or down the stairs to the cabin, where she would, in all probability, have been apt to injure herself had she followed the same methods as she did in the instant matter by failing to exercise her faculties. If warning in the instant case was necessary, the boat would be so covered up with warning signs that one extra would not attract notice or occasion comment.

ANSWERS TO SPECIFIC STATEMENTS OF APPELLANT

Under this heading at page 33 counsel says:

> "Appellant states that appellee's witnesses stated that 'Suquamish' was built like all other vessels of her class."

Appellant's witnesses made no such statement. What they did state was that the arrangement complained of was of a common and standard type in vessels of the class of the "Suquamish" which, if true, relieves the petitioner from liability—a really different statement from what counsel has stated above. Four witnesses for the petitioner each stated that there were about 100 vessels of the class of the "Suquamish" on the Sound and each one named two or three that he remembered. None of them pretended to remember all of the vessels of this class or in fact only a very few of them and they gave illustrations of the type. The testimony of Mr. Taylor is typical. On cross-examination by Mr. Martin, appellee's counsel, record page 58, he says:

> "Q. How many vessels do you know about?
>
> A. I know about all there is on Puget Sound.
>
> Q. How many vessels on Puget Sound?
>
> A. Well about 90 plying the passenger trade. I would not say how many around Seattle. I know those.
>
> Q. How many of these vessels are equipped with this center aisle and raised platform above the aisle extending out on each side?
>
> A. I would not say I knew how many; there are a good many.
>
> Q. Well, how many vessels?

A. I don't know how many.

Q. You could not tell us the name of one vessel equipped in that manner?

A. 'Dr. Martin,' the 'Falcon,' another which I think is called the 'Speeder,' and the 'Chicker,' about the size of the 'Suquamish.' "

On page 34 of his brief counsel states:

"Appellant, in drafting its petition, was evidently not familiar with the terms of U.S.R.S. 4993, and did not appreciate the importance of making it appear that the sunken aisle and raised platform were not a part of the hull, for it alleged in its petition for limitation of liability, in paragraph 2, page 6 of the transcript of the record * * * that the defects complained of in the vessel were in truth and in fact a part of the original structure of said vessel, etc."

Evidently counsel is more familiar with Sec. 4993 than he is with vessel construction, and seems to be under the delusion that if the defects complained of were a part of the original structure they must be a part of the hull of the vessel. Let us, for a moment, assume that he is correct. He then brings the case squarely within his citation of the "Erie Lighter" which he would cite as authority, but the court, in that cause, allowed the limitation of liability because the injuries were "due solely to a structural defect of the Lighter," which was the matter for which limitation was prayed in that proceeding, and what shall he say of *Savage v. N. Y. & N. H. S. S. Co.*, 185 Fed. 778, which holds that negligence cannot be predicated upon defects in the original structure of the vessel?

Cases Cited By Appellant

Under this head, page 35, counsel calls attention to *Johnson v. Port Washington Route*, stating it was not a maritime case. It was, however, a case against a maritime carrier so the measure of negligence is identical and the Supreme Court of the State of Washington holds that under an identical condition the carrier was not negligent. We submit, however, that

Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578;

Savage v. N. Y. & N. H. S. S. Co., 185 Fed. 778;

84-H *Appeal of Bouker Contracting Co.*, 296 Fed. 427,

are controlling authorities in this case and that the "Erie Lighter" and the "Annie Faxon" are in reality not authorities against the contention of appellant, but in its favor, and we therefore respectfully submit to this court that this cause should be reversed and that it make the appropriate orders in that behalf.

Respectfully submitted,

Byers & Byers, and
John A. Homer,
Proctors for Appellant.

No. 4890

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the EAST BAY MUNICIPAL UTILITY DISTRICT, JOHN H. KIMBALL, Individually and as Secretary of Said District, and of the Board of Directors Thereof, and GEORGE C. PARDEE, as President of the Board of Directors of Said District,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4890

United States

Circuit Court of Appeals

For the Ninth Circuit.

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the EAST BAY MUNICIPAL UTILITY DISTRICT, JOHN H. KIMBALL, Individually and as Secretary of Said District, and of the Board of Directors Thereof, and GEORGE C. PARDEE, as President of the Board of Directors of Said District,

Appellees.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Messrs. HADSELL, SWEET & INGALLS, Insurance Exchange Bldg., San Francisco, Calif., Attorneys for Plaintiff and Appellant.

T. P. WITTSCHEN, Esq., 608–10 Ray Building, Oakland, Calif.,
Attorney for Defendants and Appellees.
[1*]

In the District Court of the United States, in and for the Northern District of California, Southern Division.

IN EQUITY—No. 1566.

S. D. PINE,

Plaintiff,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of EAST BAY MUNICIPAL UTILITY DISTRICT, JOHN H. KIMBALL, Individually and as Secretary of said District and of the Board of Directors Thereof, GEORGE C. PARDEE, as President of the Board of Directors of said District, STEPHEN E.

*Page-number appearing at foot of page of original certified Transcript of Record.

KEIFFER, TWOHY BROS., T. E. CONNOLLY, SMITH BROTHERS, PELTON COMPANY, CHARLES K. THOMPSON, LYNN S. ATKINSON, Jr., FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE, SIXTH DOE, SEVENTH DOE, JOHN DOE COMPANY, RICHARD ROE COMPANY, SAM STOWE COMPANY, JAMES ROE COMPANY, and THOMAS DOE COMPANY,

Defendants.

COMPLAINT IN EQUITY TO ENJOIN THE LETTING OF CONTRACTS.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California, Southern Division.

The plaintiff herein, S. D. Pine, above named, brings this bill of complaint against the defendants above named and respectfully alleges:

I.

That at all the times herein mentioned the plaintiff was and now is a citizen of the State of California and of the United States and a resident of the City of Berkeley in the County of Alameda, State of California, and a duly and regularly [2] register elector therein.

II.

That at all the times herein mentioned the plaintiff was and now is an owner of record of an interest in real estate in said City of Berkeley and a taxpayer therein and in said County of Alameda.

III.

That the defendant East Bay Municipal Utility District is, and ever since the 22d day of May, 1923, has been, a municipal utility district duly and regularly organized and existing under the Act of the Legislature of the State of California, entitled, "An Act to provide for the organization, incorporation and government of municipal utility districts, authorizing such district to incur bonded indebtedness for the acquisition and construction of works and property, and to levy and collect taxes to pay the principal and interest thereon," approved May 23, 1921.

IV.

That the following municipalities of the State of California compose said defendant East Bay Municipal Utility District, to wit, the cities of Oakland, Berkeley, Alameda, Piedmont, San Leandro, Albany and Emeryville, in the County of Alameda, State of California, and the cities of Richmond and El Cerrito, in the County of Contra Costa, in said state; that no unincorporated territory is included within the boundaries of said district; that all of the territory in said East Bay Municipal Utility District is situated either within said County of Alameda or said County of Contra Costa, and that the greater portion thereof is situate within said County of Alameda. [3]

V.

That James H. Boyer, Alfred Latham and Grant D. Miller are, and ever since the said 22d day of May, 1923, have been, duly elected, qualified

and acting directors of said East Bay Municipal Utility District, and that George C. Pardee and David P. Barrows are, and ever since the 13th day of November, 1924, have been, duly elected, qualified and acting directors of said district, and that James H. Boyer, Alfred Latham, Grant D. Miller, George C. Pardee and David P. Barrows constitute the board of directors thereof, and that said George C. Pardee is the president of said district, and John H. Kimball is the secretary thereof.

VI.

That the plaintiff's aforesaid interest in real estate in said City of Berkeley is subject to taxation by said defendant East Bay Municipal Utility District under the terms of the Act under which said district is organized and that said interest in said real estate has already been taxed by said defendant said East Bay Municipal Utility District and will be continued to be taxed thereby.

VII.

That by resolution of the board of directors of said East Bay Municipal Utility District adopted at a meeting thereof held on the 21st day of August, 1924, said board of directors determined that the public interest and necessity demanded the acquisition of a source or sources of water supply for said district and other properties to be used by said district for acquiring and impounding water for said district and for conveying the same thereto; that thereafter said board of directors [4] procured some plans and estimates of the cost of original construction and completion by

said district of said utility and had the same prepared for it in the form of a report by an engineer; that thereupon said board of directors adopted said plans and estimates and said report and with reference to said report found and designated the Mokelumne River in the State of California as a source of water supply for said district; that said plans and estimates and said report, among other things, covered the construction of a dam on the Mokelumne River at a point called Lancha Plana and the construction of conduits from said dam to the San Pablo Reservoir at the eastern boundary of said district for the purpose of storing and diverting water from said Mokelumne River to said San Pablo Reservoir to supply said district with water; that said estimates specified thirty-nine million dollars ($39,000,000) as the estimated cost of said project including dam, reservoir site, rights of way, pumping plants, and conduits.

VIII.

That said plans and estimates provide that said conduit shall proceed from the point below the Lancha Plana dam in a direct line west of the City of Stockton in the County of San Joaquin, State of California, to a point near the town on Holt in said County of San Joaquin, thence in a general westerly direction in a straight line parallel to the main line of the Atchison, Topeka and Santa Fe Railroad to a point near Orwood in the County of Contra Costa, State of California, and thence along various courses and distances to said San Pablo Reservoir; that said conduit in passing

by said City of Stockton and proceeding to said point at Orwood, will cross the main channel [5] of the San Joaquin River, Middle River, Old River and numerous sloughs, canals, and drainage and irrigation ditches in the San Joaquin Delta; and that between said points said conduit will be within the boundaries of the Sacramento and San Joaquin Drainage District as established by the Legislature of the State of California under an Act approved December 24, 1911, entitled as follows: "An act approving the report of the California Debris Commission transmitted to the Speaker of the House of Representatives by the Secretary of War on June 27th, 1911, directing the approval of plans or reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the state engineer to procure data and make surveys and examinations for the purpose of perfecting the plans contained in said report of the California Debris Commission and to make report thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a reclamation board and defining its powers"; that said district has not applied to the Reclamation Board of the State of California for a permit to construct said conduit through said Sacramento and San Joaquin Drainage District or through said San Joaquin Delta or along the line herein specified and designated in said plans and estimates and that it is not known whether or not said Reclamation Board will grant permission to said dis-

tricts to build said conduits across said San Joaquin Delta along said specified line or along any other line.

IX.

That said project covered by said plans and estimates, by and through the construction of said dam, involves the appropriation and use of lands belonging to the United States of [6] America; that as prerequisite to the construction of said dam and reservoir and the maintenance thereof the said district has applied to the Federal Power Commission for a permit and license to appropriate and use the lands of the United States of America for the purpose of said project under the terms of the Federal Water Power Act approved June 10, 1920, and that said application to said Federal Power Commission is now pending and undetermined.

X.

That in order to secure the right to appropriate waters of the Mokelumne River the said district has also applied to the Board of Public Works, State of California, Division of Water Rights for a permit to appropriate water of said Mokelumne River at said Lancha Plana dam site and said application for said permit is now pending before said Division of Water Rights.

XI.

That said district has not obtained at this time and does not own any right to appropriate any water of the Mokelumne River and has not yet obtained and does not have any authority whatever

from the United States of America to make use of said lands of said United States of America.

XII.

That said applications before the Division of Water Rights and said Federal Power Commission have been protested by numerous persons, corporations and reclamation districts and hearings thereon are now being conducted jointly by said division of Water Rights and said Federal Power Commission in the City of Sacramento, State of California, and said hearings have not yet been concluded and what the outcome thereof will be is entirely unknown. [7]

XII.

That said project covered by said plans and estimates is not a project for the production of power but is a project solely for the bringing of additional water supplies from the Mokelumne River to said District.

XIV.

That said conduit between the points mentioned in Paragraph VIII of this bill of complaint will cross three navigable rivers, to wit: The main channel of the San Joaquin River, Middle River, and Old River and several navigable sloughs and that commerce is carried on, upon, along and over said rivers and channels between Stockton, Antioch, San Francisco and other towns and cities within the counties of Sacramento, San Joaquin, Contra Costa, Napa, Marin, Alameda and San Francisco; that said East Bay Municipal Utility District has not obtained from the War Department of the

United States any permit to build said conduit across said navigable channels and it is not now known whether or not said district may ever be able to acquire said permit.

XV.

That said district has not acquired a permit from the California Debris Commission for the construction of said conduit between the points mentioned in said Paragraph VIII and that it is not known whether or not said district will ever be permitted by said California Debris Commission to build said conduit across said San Joaquin Delta.

XVI.

That the plaintiff herein does not know the names of the defendants who are sued herein as First Doe, Second Doe, Third [8] Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, John Doe Company, Richard Roe Company, Sam Stowe Company, James Roe Company and Thomas Doe Company and requests that when the true names of said defendants have been ascertained then this bill of complaint may be amended accordingly.

XVII.

That several months ago said district called for bids for the construction of said project in accordance with said plans and estimates and specified that said bids would be opened on the 4th day of September, 1925; that prior to the said 4th day of September, 1925, numerous bids were made to said district for the construction of said project and for the construction of various portions

thereof; that all of the defendants named, except said district and the defendant officials thereof, made bids on said project or various portions and parts thereof for the construction thereof; that said bids were opened on the said 4th day of September, 1925, but that as yet no contracts have been awarded to said defendants or to any of them or to any of said bidders; that since the opening of said bids the engineer and officials of said district have been studying said bids for the purpose of determining to whom contracts should be awarded and that said engineer and said officials of said district are now ready to award contracts on said bids as based upon the investigations and studies made by them of and concerning said bids; that the board of directors of said District will hold a meeting on the evening of Friday, September 25, 1925, to take official action with reference to said bids and the awarding of contracts thereon and that said board of directors propose at said meeting to award contracts on said [9] bids with reference to the construction of said project and parts and portions thereof.

XVIII.

That a majority of the voters and not a majority of the electors of said district has approved the construction of said project and has also approved the issuance of bonds of said district to the extent of thirty-nine million dollars ($39,000,000) to pay for the construction thereof and that said district is now ready to finance the construction of said project by the issuance and sale of said bonds.

XIX.

That other applications are pending and are now being heard before said Federal Power Commission and said Division of Water Rights for the use of the waters of said Mokelumne River for power purposes by the construction of said dam and reservoir at Lancha Plana and that said applications are prior in time to the said application of said defendant district.

XX.

That the following Federal questions are involved in said action:

(a) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the permission of the California Debris Commission first had and obtained;

(b) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the consent of the War Department of the United States first had and obtained;

(c) Whether or not the Federal Power Commission can issue any permit or license to said district for the use of said [10] federal lands for the purposes for which said district proposes to use the same;

(d) Whether or not the Federal Power Commission can issue a license under the Federal Water Power Act where the applicant, under its organic act, cannot accept the provisions of Section 14 of the Federal Water Power Act;

(e) Whether or not said Federal Power Commission can issue a license to an applicant which,

under its organic act cannot subject its property to the acquisition, forfeiture, control and appropriation by the United States as provided under the terms of the Federal Water Power Act.

XX.

That the plaintiff herein does not know the citizenship or residence of any of the defendants other than the officials of said district and Stephen E. Keiffer; that the defendant officials of said district and said Stephen E. Keiffer are citizens and residents of the State of California and the United States of America and reside within the defendant district.

XXI.

That all of the bidders to whom contracts may be awarded as herein alleged have been made and now are defendants in this action.

XXII.

That the amount of the bid of each defendant herein for the construction of all or part or portion of said project exceeds the sum or value of three thousand dollars ($3,000) exclusive of interest and costs.

XXIII.

That the letting of any contract for the construction [11] of works which will later have to be abandoned by the district because of inability to procure the necessary permits and licenses as herein set forth will subject said district to damages, costs and expenses in large amounts and the construction of any of said project which will later have to be abandoned because of the district's

inability to procure said licenses and permits will be a waste of funds of the district in very large amounts and that until said district has obtained said permits and licenses said district should be enjoined from letting any contracts or spending any moneys in connection with the construction of said project or any parts or portions thereof in order that thereby a waste of public moneys may be prevented.

XXIV.

That answer hereto under oath is hereby expressly waived.

WHEREFORE, plaintiff prays the judgment and decree of this Court:

1. That any contracts let by said defendant district prior to the time that said district has obtained all of the permits and licenses herein mentioned are void and without effect.

2. That said district shall not let any contracts for the construction of said project or any portion or portions thereof until said district has obtained all of the licenses and permits herein mentioned.

3. That said Federal Power Commission is unable to issue and the defendant district is unable to accept any license under the Federal Water Power Act for the proposed project of the defendant district and that defendant district shall not [12] construct said Lancha Plana dam and reservoir and shall not build said conduit therefrom.

4. That the defendant district herein shall not let any contract or contracts or expend any funds

for the construction of said project or any part or portion thereof.

5. That the defendant officials of said district shall likewise be enjoined with said district and that the other defendants herein shall likewise be enjoined from entering into any contracts with said district for the construction of said project or any part or portion thereof.

6. That the plaintiff herein shall have such other relief as the equity of the case may require and to this Honorable Court may seem meet.

Plaintiff also prays that proper process shall issue forthwith out of and under the seal of this Honorable Court directed to said defendants commanding them to appear and make answer to this bill of complaint and to perform and abide by such order and decree herein as to this Court may seem required by the principles in equity and good conscience.

S. D. PINE,
Plaintiff.

HADSELL, SWEET & INGALLS,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

On this 25th day of September, 1925, before me came S. D. Pine, the plaintiff named in the foregoing bill and he, being by me duly sworn, did depose and say:

That he has read the foregoing bill and knows its contents and that the same is true of his own knowledge except as [13] to the matters therein

stated on information and belief and as to those matters he believes it to be true.

S. D. PINE.

Subscribed and sworn to before me this 25th day of September, 1925.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Sep. 25, 1925. [14]

(Title of Court and Cause.)

NOTICE OF MOTION FOR ORDER DISMISSING BILL OF COMPLAINT.

To S. D. Pine, Complainant in the Above-entitled Action, and to Messrs. Hadsell, Sweet and Ingalls, His Solicitors:

You, and each of you, will please take notice that on Monday, the 15th day of February, 1926, at the hour of ten o'clock A. M. of said day at the courtroom of the above-entitled court, Division No. 3 thereof, in the City and County of San Francisco, State of California, Defendants, East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, individually and as Secretary of said District, and of the Board of Directors thereof, and George C. Pardee as President of the Board of Directors of

said District, will move said Court for an order dismissing the bill of complaint on file herein. Said motion will be made and based upon this notice and upon all the grounds stated in the written motion to dismiss hereto attached and made a part hereof by reference, upon all the papers, records and files on file in the above-entitled matter, upon the affidavit of Geo. C. Pardee hereto attached and upon points and authorities hereafter to be served upon you prior to the hearing.

Dated: February 8th, 1926.

T. P. WITTSCHEN,

Solicitor for said Moving Defendants. [15]

(Title of Court and Cause.)

MOTION TO DISMISS OF THE EAST BAY MUNICIPAL UTILITY DISTRICT ET AL.

Comes now the East Bay Municipal Utility District, a corporation, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, individually and as Secretary of said District, and of the Board of Directors thereof, and George C. Pardee as President of the Board of Directors of said District, named among others as defendants in the bill of complaint in the above-entitled suit, and respectfully move the Court for an order to dismiss such suit as to the said defendants and each of them, upon the following grounds, to wit:

I.

That the said bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

II.

That the said bill of complant does not state facts alleging any fraud or misconduct on the part of any of the said defendants appearing herein or any facts which would justify the action of this Court in restraining the said defendants and officers of said East Bay Municipal Utility District from exercising the individual judgment and discretion which they are entitled to exercise as the duly elected, qualified, and acting officers and directors of said District, as aforesaid.

III.

That said bill of complaint is predicated upon the fact that the complainant is a taxpayer in said District, and [16] will be prejudiced and injured by reason of the amount of taxes he will have to pay in the event that the business and affairs of said District are conducted in the manner complained of. That it nowhere appears in said bill of complaint what the amount of taxes are that said complainant has paid, or will pay, in the event the said contracts are carried out; that the assessed value of the property of said complainant is not stated, nor is the assessed value of all of the property in said District stated, in order that the Court may ascertain what is the proportion that said complainant's property bears to the whole; nor is there any allegation that the complainant

has paid or will be required to pay, taxes to the amount of Three Thousand Dollars ($3,000).

IV.

That this Court is without jurisdiction to hear and entertain the said suit, in that the amount in controversy does not equal or exceed the sum of Three Thousand Dollars ($3,000), and that there are no facts alleged showing that the amount in controversy does not exceed or amount to said sum.

V.

That there are no facts alleged sufficient to show that there is any federal question involved in this suit, nor any case or controversy arising under the constitution or laws of the United States. That the matters complained of concern the execution of the discretion and good faith of the Board of Directors of said District, as to how they will conduct and manage the affairs of said District, and the alleged maladministration of the affairs of said District does not raise a federal question sufficient to confer jurisdiction upon this [17] Court.

VI.

That there are no facts stated sufficient to show how any of the matters alleged in Paragraph XX, raise any federal question; that the control of the federal Government over its public lands and navigable waters is not disputed and it is not required that there be any construction thereof; the sole matter involved in the suit is the right of the defendant District and those defendants who are officers and directors thereof to manage and conduct

the affairs of the District in accordance with their judgment and discretion; that this is not a federal question, and no facts are alleged which make it such.

VII.

That said complainant in this suit is not the proper party in interest, in that he has no direct interest as an officer or member of any public body or commission, state or federal, which is concerned with any rights of the state or federal Government referred to in the bill of complaint, and is not suing on behalf of any such.

Dated: February 8th, 1926.

T. P. WITTSCHEN,
Solicitor for said Defendants.

Received a copy of the within this 8th day of Feb., 1926.

HADSELL, SWEET & INGALLS,
By D. O. HADSELL,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1926. [18]

(Title of Court and Cause.)

AFFIDAVIT OF GEO. C. PARDEE.

State of California,
County of Alameda,—ss.

George C. Pardee, being duly sworn, deposes and says:

That he is the President of the Board of Directors of the East Bay Municipal Utility District;

that said District is a municipal corporation of the state of California formed pursuant to an act entitled "An Act to provide for the organization, incorporation and government of municipal utility districts, authorizing such districts to incur bonded indebtedness for the acquisition and construction of works and property, and to levy and collect taxes to pay the principal and interest thereon," approved May 23, 1921 (Statutes 1921, page 245).

That the boundaries of said District are coincident with the corporate limits of the cities of Richmond and El Cerrito, in the County of Contra Costa, and of Albany, Berkeley, Piedmont, Emeryville, Oakland, Alameda, and San Leandro, in the County of Alameda, State of California; the population of said District as shown by the 1920 census is 334,298 and that the population of the said district at the present time is between four and five hundred thousand people.

That the electors of said District heretofore approved a project for bringing water to said District from the Mokelumne River, voting bonds for such purpose to the extent of $39,000,000; that the validity of said bonds was contested in the Superior and Supreme Courts of the State of California and their validity sustained, the decision of said Supreme Court [19] becoming final on the 23d day of September, 1925; that the proceeds of said bonds are being devoted to the consummation of the project of the District.

That the said cities comprising said District and the inhabitants thereof are menaced by a very se-

rious situation with reference to their water supply; that the local supplies are wholly inadequate and it is imperative that work for a new supply from a distant source be diligently prosecuted; that during the dry season of 1924 the runoff from the local streams supplied only a small *por*portion of the demands of the District, the balance being supplied from wells pumping from the underground supply in Alameda County, said wells being situated near the shore of San Francisco Bay; that the draft on said wells during said year was so great that the water level was reduced to many feet below sea level, causing an infiltration of salt water from the Bay into certain of said wells to such an extent that the water could only be used by a mixture with pure water; that if occasion should demand a renewal of said abnormal draft there is danger of ruining the entire supply through the infiltration of salt water.

That the need for a larger and more dependable supply was recognized by the East Bay Water Company, the public service corporation which at present supplies the said cities and the inhabitants thereof with water; that by reason of said conditions said corporation in the year 1925 did petition the Railroad Commission of the State of California for leave to issue securities to the amount of $10,000,000, in order to bring a new supply of water from the lower Sacramento River to said District; that a hearing was held on said petition and the petition was denied by said Railroad Commission because this [20] district (appearing in

said proceedings in opposition to said petition of said corporation) promised that it would immediately proceed to bring in such supply without delay and would with all possible dispatch construct the aqueduct lines and tunnels between the District and the San Joaquin River, so that, if there were a shortage, an emergency supply could be pumped from said river to the said District; that said pumping would take place during the flood flow of said river and when there was an abundance of water in said stream, which with proper treatment could serve as an emergency supply for said District; that such construction work between the boundaries of the District and the said San Joaquin River will tie in with and will ultimately be a part of the aqueduct lines to the Mokelumne River and would be necessary in any event for almost any other distant supply for the District.

That by reason of the understanding had between the officials of the District and the State Railroad Commission immediately upon said litigation concerning the validity of said bonds becoming final the said District entered into contracts for the construction of that part of its project which was west of the San Joaquin River; contracts were also let for the work east of the San Joaquin River, but all of said contracts for work east of the River contained a clause that no work should begin until ordered by the District and in and by such contracts the District reserved the right to cancel the same at any time before ordering said work to begin; that said clause was put

into said contracts in order to protect the District in the event any contingency arose which might necessitate a change in its plans; that while said contracts were not awarded and signed until after a formal award was made [21] by the Board of Directors of said District the day this suit was filed, the Board agreed with the contractor who was the successful bidder on the greater portion of said work on the terms of said contracts and a letter to that effect was on file with the District prior to any knowledge the District had of this suit and prior to its filing.

That the Board of Directors of said District is charged with the responsibility of providing for the needs of said District; that in the exercise of the discretion committed to them the said Board of Directors did let said work and contracts to the extent herein provided; that in the unanimous opinion of said Board this action was necessary and in the best interests of the District.

That the District has pending before the Division of Water Rights of the State of California applications for permits to use the waters of the Mokelumne River for municipal and power purposes; that there is no reason to believe same will not be granted; that the District and its officers have consulted and advised with several duly licensed, qualified and practicing attorneys at law of this state and are advised by such attorneys that under the laws of this state the District is entitled to such permits; that under all the circumstances the Board concluded that the best interest

of said District were conserved by diligently prosecuting said work.

GEO. C. PARDEE.

Subscribed and sworn to before me this 8th day of February, 1926.

[Seal] T. P. WITTSCHEN,

Notary Public in and for the County of Alameda, State of California.

Received a copy of the within this 8th day of Feb. 1926.

HADSELL, SWEET & INGALLS,
D. HADSELL,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1926. [22]

(Title of Court and Cause.)

NOTICE OF MOTION FOR FURTHER AND BETTER PARTICULARS UNDER EQUITY RULE No. 20.

To S. D. Pine, Complainant in the Above-entitled Action, and to Messrs. Hadsell, Sweet and Ingalls, His Solicitors:

You, and each of you, will please take notice that on Monday, the 15th day of February, 1926, at the hour of ten o'clock A. M. of said day, at the courtroom of the above-entitled court, Division No. 3 thereof, in the City and County of San Francisco, State of California, Defendants, East Bay Municipal Utility District, George C. Pardee, Grant

D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, individually and as Secretary of said District, and of the Board of Directors thereof, and George C. Pardee as President of the Board of Directors of said District, will move said Court for an order requiring the complainant to furnish further and better particulars of certain matters set forth in the bill of complaint on file herein as will more particularly appear from the motion of said defendants, a copy of which is hereto attached and made a part of this notice by reference. Said motion will be made and based upon this notice, and upon all the papers, records and pleadings, on file in the above-entitled court and cause.

Dated: February 8th, 1926.

T. P. WITTSCHEN,
Solicitor for said Moving Defendants. [23]

(Title of Court and Cause.)

MOTION FOR FURTHER AND BETTER PARTICULARS UNDER EQUITY RULE No. 20.

East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, individually and as Secretary of said District, and of the Board of Direc-

tors thereof, and George C. Pardee as President of the Board of Directors of said District, having heretofore appeared in this suit with a motion to dismiss the bill of complaint, and without in any manner waiving, but expressly insisting upon said motion, and upon each and every one of the grounds therein set forth, and reserving all of their rights in said motion, and reserving the right to again present said matters to this Court upon or before the final hearing of this suit, and also reserving their right to be heard upon said questions in any appeal that may hereafter be taken, now appear specially herein, and respectfully move the Court for further and better particulars of the following matters set forth in said bill of complaint:

I.

That in Paragraph II of said complaint, it is mentioned that the complainant was and is an owner of record of an interest in real estate in the City of Berkeley, and a taxpayer therein, and in the County of Alameda. These defendants request that there be stated the nature of the interest in real property of the said plaintiff, the assessed value of said real property, and the amount of taxes that the said complainant [24] has paid thereon for District purposes for any of the years immediately last past.

II.

In Paragraph VI it is stated that complainant's interest in real estate in the said City of Berkeley is subject to taxation and has been taxed, and will continue to be taxed by the said defendant District.

The defendants respectfully request that the complainant be required to state the full particulars with reference to his said property, namely, the assessed valuation thereof, the amount that it has already been taxed, for the purposes of said defendant District, and the proportion that the assessed value of the property of said complainant bears to all of the taxable property in said District.

III.

That in Paragraph XX it is claimed that certain federal questions are involved in this suit. That the said complainant be required to set forth the particulars in which any federal question is involved, whether he is an officer of any of the State or Federal Departments mentioned in said Paragraph XX; whether he is suing on behalf and by the authority of any of the State or Federal Commissions mentioned in said paragraph and how, or in what manner, the administration by the defendants as Directors of said District, and the exercise of their discretion in the letting of contracts for and on behalf of said District, raises any federal question.

Dated: February 8th, 1926.

T. P. WITTSCHEN,

Solicitor for the Defendants Appearing by This Motion.

Received a copy of the within this 8th day of Feb. 1926.

HADSELL, SWEET and INGALLS,
By D. O. HADSELL,
Attorney for Plaintiff.

[Endorsed]: Filed Feb. 8, 1926. [25]

(Title of Court and Cause.)

NOTICE OF MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

To the Defendants Above Named, East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, Individually, and as Directors of East Bay Municipal Utility District, John H. Kimball, as Secretary of Said District and of the Board of Directors Thereof, and George C. Pardee, as President of the Board of Directors of Said District, and to T. P. Wittschen, Their Attorney:

YOU AND EACH OF YOU WILL PLEASE TAKE NOTICE that on Monday, the 15th day of March, 1926, at the hour of ten o'clock A. M., of said day, at the courtroom, in the above-entitled court, Division 3 thereof, in the City and County of San Francisco, State of California, the plaintiff herein, S. D. Pine, will move said Court for an order permitting, authorizing and directing the plaintiff herein to file an amended and supple-

mental bill of complaint herein, as will more particularly appear from the motion of said defendant, a copy of which is hereto attached and made a part of this motion by reference.

Said motion will be made and based upon this notice and the attached motion and attached proposed amended and supplemental bill of complaint and upon all of the papers, records and pleadings now on file in the above-entitled court in this cause.

D. O. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
Attorneys for Said Moving Plaintiff.

Dated: March 5, 1926. [26]

(Title of Court and Cause.)

MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL BILL OF COMPLAINT.

S. D. Pine, plaintiff in the above-entitled cause, respectfully moves the Court for leave to file herein an amended and supplemental bill of complaint, which is attached hereto and served and filed herewith.

This motion is made upon the grounds that transactions material to this cause have occurred since the filing of the original bill of complaint herein; that since the filing of said bill of complaint plaintiff herein has obtained definite knowledge and information upon matters which were unknown to plaintiff

at the time of filing said bill of complaint; that the filing of said amended and supplemental bill of complaint will be in furtherance of justice and that additional allegations are proper in order more particularly to show the existence of the jurisdictional amount in controversy and also of the existence of the federal question.

D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
Attorneys for Plaintiff.

Dated: March 5, 1926. [27]

(Title of Court and Cause.)

AMENDED AND SUPPLEMENTAL COMPLAINT IN EQUITY TO ENJOIN THE LETTING OR PERFORMANCE OF CONTRACTS.

To the Honorable the Judges of the District Court of the United States in and for the Northern District of California, Southern Division.

The plaintiff herein, S. D. Pine, above named, files this amended and supplemental bill of complaint against the defendants above-named and respectfully alleges:

I.

That at all the times herein mentioned the plaintiff was and now is a citizen of the State of California and of the United States and a resident of the City of Berkeley in the County of Alameda,

State of California, and a duly and regularly registered elector therein.

II.

That at all the times herein mentioned the plaintiff was and now is an owner of record in an interest in real estate in said City of Berkeley and a taxpayer therein and in said County of Alameda; that said real estate is a house and lot situated at 3048 College Avenue in said City of Berkeley; that at all times herein mentioned said real estate was and now is owned by plaintiff and his wife and was and now is assessed to plaintiff and his wife; that on the last equalized assessment of said real estate for county purposes and the purposes of said district the assessed value thereof was fixed at $3400.00; that the amount of tax last levied on said real estate for the purposes of defendant district was at the rate of thirteen cents (13¢) per hundred dollars of assessed valuation; that plaintiff has paid and continues to pay from plaintiff's own [28] income all taxes levied against said real estate.

III.

That the defendant East Bay Municipal Utility District is, and ever since the 22d day of May, 1923, has been, a municipal utility district duly and regularly organized and existing under the Act of the Legislature of the State of California, entitled "An act to provide for the organization, incorporation and government of municipal utility districts, authorizing such districts to incur bonded indebtedness for the acquisition and construction

of works and property, and to levy and collect taxes to pay the principal and interest thereon," approved May 23, 1921; that the following municipalities of the State of California compose said defendant East Bay Municipal Utility District, to wit: the cities of Oakland, Berkeley, Alameda, Piedmont, San Leandro, Albany and Emeryville, in the County of Alameda, State of California, and the cities of Richmond and El Cerrito, in the County of Contra Costa, in said state; that no unincorporated territory is included within the boundaries of said district; that all the territory in said East Bay Municipal District is situated either within said County of Alameda or said County of Contra Costa, and that the greater portion thereof is situate within said County of Alameda; that the total assessed value of all property within said district for district purposes upon the last equalized county assessment-rolls for said Alameda and Contra Costa Counties was $345,208,704; that the number of taxpayers on said rolls as to property assessed within said district for district purposes was and now is approximately 190,000.

IV.

That James H. Boyer, Alfred Latham and Grand D. Miller [29] are, and ever since the said 22d day of May, 1923, have been, duly elected, qualified and acting directors of said East Bay Municipal Utility District, and that George C. Pardee and David P. Barrows are, and ever since the 13th day of November, 1924, have been, duly elected, qualified and acting directors of said district, and that

said James H. Boyer, Alfred Latham, Grant D. Miller, George C. Pardee and David P. Barrows constitute the board of directors thereof, and that said George C. Pardee is the president of said district, and John H. Kimball is the secretary thereof.

V.

That at all the times hereinafter mentioned the defendant Twohy Brothers Company was and now is a corporation organized and existing under and by virtue of the laws of the State of Oregon and authorized to do and doing business in the State of California.

That at all the times hereinafter mentioned the defendant J. F. Shea Company was and now is a copartnership composed of the defendants J. F. Shea, Charles A. Shea and G. J. Shea.

VI.

That the plaintiff's aforesaid interest in real estate in said City of Berkeley is subject to taxation by said defendant East Bay Municipal Utility District under the terms of the Act under which said district is organized and that said interest in said real estate has already been taxed by said defendant, said East Bay Municipal Utility District, and will be continued to be taxed thereby.

VII.

That by resolution of the board of directors of said [30] East Bay Municipal Utility District adopted at a meeting thereof held on the 21st day of August, 1924, said board of directors determined

that the public interest and necessity demanded the acquisition of a source or sources of water supply for said district and other properties to be used by said district for acquiring and impounding water for said district and for conveying the same thereto; that thereafter said Board of Directors procured some plans and estimates of the cost of original construction and completion by said district of said utility and had the same prepared for it in the form of a report by an engineer; that thereupon said board of directors adopted said plans and estimates and said report and with reference to said report found and designated the Mokelumne River in the State of California as a source of water supply for said district; that said plans and estimates and said report, among other things, covered the construction of a dam on the Mokelumne River at a point called Lancha Plana, the creation of a reservoir back of said dam covering more than two thousand acres of land and holding more than two hundred thousand acre feet of water, and the construction of conduits from said dam to the San Pablo Reservoir at the eastern boundary of said district, all for the purpose of storing and diverting water from said Mokelumne River to said San Pablo Reservoir to supply said district with water; that said estimates specified thirty-nine million dollars ($39,000,000) as the estimated cost of said project including dam, reservoir site, rights of way, pumping plants, and conduits.

VIII.

That said plans and estimates provide that said conduits [31] shall proceed from the point below the Lancha Plana dam in a direct line west of the City of Stockton in the County of San Joaquin, State of California, to a point near the town of Holt in said County of San Joaquin, thence in a general westerly direction in a straight line parallel to the main line of the Atchison, Topeka and Santa Fe Railroad to a point near Orwood in the County of Contra Costa, State of California, and thence along various courses and distances to said San Pablo Reservoir; that said conduits, in passing by said City of Stockton and proceeding to said point at Orwood, will cross the main channel of the San Joaquin River, Middle River, Old River and numerous sloughs, canals, and drainage and irrigation ditches in the San Joaquin Delta; and that between said points said conduits will be within the boundaries of the Sacramento and San Joaquin Drainage District as established by the Legislature of the State of California under an Act approved December 24, 1911, entitled as follows: "An act approving the report of the California Debris Commission transmitted to the speaker of the House of Representatives by the Secretary of War on June 27th, 1911, directing the approval of plans of reclamation along the Sacramento River or its tributaries or upon the swamp lands adjacent to said river, directing the state engineer to procure date and make surveys and examinations for the purpose of perfecting the plans contained

in said report of the California Debris Commission and to make report thereof, making an appropriation to pay the expenses of such examinations and surveys, and creating a reclamation board and defining its powers"; that said district has not applied to said Reclamation Board of the State of California for a permit to construct said conduits through said Sacramento and San [32] Joaquin Drainage District or through said San Joaquin Delta or along the line herein specified and designated in said plans and estimates and that it is not known whether or not said Reclamation Board will grant permission to said district to build said conduits across said San Joaquin Delta along said specified line or along any other line.

IX.

That said project covered by said plans and estimates, by and through the construction of said dam, involves the appropriation and use of several hundred acres of lands belonging to the United States of America; that as prerequisite to the construction of said dam and reservoir and the maintenance thereof the said district has applied to the Federal Power Commission for a permit and license to appropriate and use said lands of the United States of America for the purpose of said project under the terms of the Federal Water Power Act approved June 10, 1920, and that said application to said Federal Power Commission is now pending and undetermined; that said dam, if constructed, will be located upon said lands of the United States and said reservoir above said dam will also be

partly located upon said lands of the United States; that the only available dam site which is suitable for the purposes of the district and for the construction of a dam on the Mokelumne River to provide said reservoir at said reservoir site is on said land of the United States; that the construction of any dam on said Mokelumne River which will create said reservoir will necessarily include said lands of the United States in said reservoir.

X.

That in order to secure the right to appropriate waters [33] of the Mokelumne River the said district has also applied to Board of Public Works, State of California, Division of Water Rights for a permit to appropriate water of said Mokelumne River at said Lancha Plana dam site and said application for said permit is now pending before said Division of Water Rights.

XI.

That said district has not obtained at this time and does not own any right to appropriate any waters of the Mokelumne River and has not yet obtained and does not have any authority whatever from the United States of America to make use of said lands of said United States of America.

XII.

That said application before the Division of Water Rights and said Federal Power Commission have been protested by numerous persons, corporations and reclamation districts and formal hearings thereon, at the time of filing the bill of com-

plaint herein, were being conducted jointly by said Division of Water Rights and said Federal Power Commission in the City of Sacramento, State of California; that since the filing of said bill of complaint said formal hearings have been concluded but no decisions thereon have been made and what the outcome thereof will be is entirely unknown.

XIII.

That said project covered by said plans and estimates is not a project for the production of power but is a project solely for the bringing of additional water supplies from the Mokelumne River to said district.

XIV.

That said conduits between the points mentioned in Paragraph VIII of this bill of complaint will cross three [34] navigable rivers, to wit: The main channel of the San Joaquin River, Middle River, and the Old River and several navigable sloughs and that interstate as well as intrastate commerce is carried on, upon, along and over said rivers and channels between Stockton, Antioch, San Francisco, and other towns and cities within the Counties of Sacramento, San Joaquin, Contra Costa, Napa, Marin, Alameda and San Francisco; that said East Bay Municipal Utility District has not obtained from the War Department of the United States of America any permit to build any conduit across said navigable channels and it is not now known whether or not said district may ever be able to acquire said permit.

XV.

That said district has not acquired a permit from the California Debris Commission for the construction of said conduit between the points mentioned in said Paragraph VIII and that it is not known whether or not said district will ever be permitted by said California Debris Commission to build said conduit across San Joaquin Delta.

XVI.

That at the time of filing the bill of complaint herein the plaintiff did not know the names of the defendants who were sued herein as First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, John Doe Company, Richard Roe Company, Sam Stowe Company, James Roe Company and Thomas Doe Company and so alleged in Paragraph XVI of said bill of complaint and requested that when the true names of said defendants had been ascertained then said bill of complaint might be amended accordingly. [35]

That since the filing of said bill of complaint this plaintiff has learned that the true name of defendant "Twohy Bros." is "Twohy Brothers Company," a corporation, that the true name of First Doe is J. F. Shea, that the true name of Second Doe is Charles A. Shea, that the true name of Third Doe is G. J. Shea, that the true name of Fourth Doe is Geo. K. Thompson and that the true name of John Doe Company is J. F. Shea Company, a copartnership; that accordingly this plaintiff desires and requests that said true names of said defendants as herein set forth shall be

substituted for said fictitious names of said defendants and that any further proper process shall issue out of and under the seal of this court directed to said defendants commanding them to appear and make answer to this amended and supplemental bill of complaint and to perform and abide by such order and decree herein as to this Court may seem required by the principles in equity and good conscience.

XVII.

That several months prior to the filing of the bill of complaint herein (said bill having been filed on September 25, 1925) said district called for bids for the construction of said project in accordance with said plans and estimates and specified that said bids would be opened on the 4th day of September, 1925; that prior to the 4th day of September, 1925, numerous bids were made to said district for the construction of said project as an entirety and for the construction of various portions thereof; that all of the defendants named in the title of this amended and supplemental bill, except said defendant district and the defendant officials thereof, made bids on said project or various portions and parts thereof [36] for the construction thereof; that said bids were opened on said 4th day of September, 1925, but that at the time of the filing of the bill of complaint herein on said September 25, 1925, no contracts had been awarded to said defendants, or to any of them, or to any of said parties; that between said 4th day of September, 1925, and said September 25, 1925,

the engineer and officials of said district studied said bids for the purpose of determining to whom contracts should be awarded and that said engineer and said officials of said district; on the said September 25, 1925, had become prepared and were ready to award contracts on said bids, as based upon investigations and studies made by them of and concerning said bids; that subsequent to the filing of the bill of complaint herein on September 25, 1925, said Board of Directors of said district held a meeting on the evening of said day to take official action with reference to said bids and the awarding of contracts thereon, and that said meeting of said Board of Directors was called for the express purpose of awarding contracts on said bids with reference to the construction of said project and parts and portions thereof; that on the late afternoon, or early evening, of said September 25, 1925, the defendant district and defendant officials thereof, were served with the bill of complaint in this suit and with process issued therein and that the said service of the bill of complaint and process occurred prior to the awarding of contracts as hereinafter stated; that at said meeting of said Board of Directors of said District, which said meeting was attended by all of the members of said Board of Directors, said Board of Directors, by the unanimous vote of all members thereof, awarded contracts [37] on said bids as are particularly hereinafter set forth and that thereafter, in accordance with said awards by said Board of Directors, contracts were let by said district to

various defendants named in the title of this amended and supplemental bill on dates and for the purposes and at contract prices as follows:

FIRST. That on the 6th day of November, 1925, the said district, as first party, entered into a contract with Lynn S. Atkinson, Jr., as second party, for the construction and completion by second party of items 1 to 16, inclusive, covering the Lancha Plana Dam, outlets through dam, including gates and power-house (a part of the Mokelumne River Project of said District), the same being schedule 10 of Plan 1 of the specifications covering the said work; that the contract price was specified in said contract as $3,081,378, more or less, in accordance with said prices and bid of second party, and said contract further contained the following provision:

> "Anything in said specifications to the contrary notwithstanding the work provided for by this contract shall be commenced by second party within thirty days after but not before receipt from the district in writing of notice so to do in conformity with the provisions of this paragraph and the period within which the work shall be completed as provided in the said specifications shall begin with the receipt by second party of such notice. In view of the fact that the application of the district for the use of the lands *which* which said dam is to be constructed is still pending and undecided before the Federal Power Commission and in view of the further fact that it may

become necessary and desirable to make some substantial alterations in the plans and specifications for said dam, it is distinctly [38] understood and agreed that the said district need not give the said notice in writing to begin said work for a period of 12 months from and after the date hereof and during said period of twelve months may at its option terminate and cancel this agreement without liability in any way to the said second party. If the said notice to begin said work be not given within said period of twelve months, then in that event at the expiration of said time the said contractor may at his option terminate and cancel this agreement without liability to the district."

SECOND. That under date of November 6, 1925, said district, as first party, and the defendants Charles Thompson and George K. Thompson, as second parties, entered into a contract whereby said second parties agreed to construct and complete Items 1 to 7 inclusive, covering the Lancha Plana tunnel, approaches and outlet (all part of the Mokelumne River Project of said District) the same being Schedule 9 of Plan 1 of the specifications covering the said work; that said contract specified, as the contract price, the sum of $624,045, more or less, in accordance with prices and bid of second party, and said contract also contained the same provisions which are set forth as contained in the contract of the same date between said District and the defendant, Lynn S. Atckinson, Jr.

THIRD. That under date of September 29, 1925, the District, as first party, and defendants Twohy Brothers Company, an Oregon corporation, and J. F. Shea, Charles A. Shea and G. J. Shea, individually and as copartners, and J. F. Shea Company, a copartnership, all as second parties, entered into a contract whereby said second parties agreed to complete and install a pipe aqueduct from Lancha Plana tunnel to Station [39] 950, the same being Items 12 to 24, inclusive, of Schedule "F" of Plan 2, and Items 1–C and 2–C of the contractors alternate Schedule "F" under the provisions of paragraph 116 of the District's specifications; that the contract price as specified in said contract was the sum of $1,671,697.50, more or less, in accordance with the prices and bid of said second parties, and said contract further contained provisions as follows:

> "The work provided for by this contract shall be actually commenced by second parties within thirty days after and not before receipt from the district in writing of notice so to do in conformity with the provisions of this paragraph, and the period within which the work shall be completed, as provided in the specifications, shall begin with the date of receipt by the second parties of such notice. If the notice above mentioned be given within a period of three months from and after the date of this contract all the terms and conditions hereof shall remain in full force and effect. . . .
>
> Provided, however, that in lieu of notice to

begin said work the District may elect to cancel and terminate this agreement and it shall have the right so to do at any time before ordering said work to begin; after six months from the date hereof but not before, and in the event no notice to begin such construction is given by the district the contractors shall have the right to terminate this contract. The election herein given the respective parties shall be exercised by each of the respective parties serving written notice thereof on the other."

FOURTH. That likewise on said 29th day of September, [40] 1925, said parties just above mentioned in subparagraph third hereof entered into another contract whereby said second parties agreed to complete and install a pipe aqueduct from the eastern edge of peat lands station 950 to station 1,840, same being Items 5 to 18, inclusive, of Schedule "E" of Plan 2 and Items 1–C and 2–C of the contractors Alternate Schedule "E" under the provisions of paragraph 116 of the district's specifications covering the work; that the contract price specified in said contract was the sum of $2,007,361.50, more or less, in accordance with the prices and bid of said second parties; that said contract also contained the provisions more particularly set forth in said subdivision third hereof.

FIFTH. That likewise on said September 29, 1925, said parties mentioned in subdivision Third of this paragraph entered into another contract whereby said second parties agreed to complete and install a pipe aqueduct from the western edge of

peat lands to the eastern edge of peat lands station 1,840 to station 2,704, the same being Items 2 to 18, inclusive, of Schedule "D" and Items 1–C of contractor's Alternate Schedule "D" under the provisions of paragraph 116 of the district's specifications covering the work; that the contract price specified in said contract was $2,112,820, more or less, in accordance with the prices and bid of the said second parties; that said contract also contained said provision which is particularly set forth in subdivision third of this paragraph, save and except that said provision was specifically made to apply only to that portion of the work covered by said contract which is east of the west bank of Old River.

That none of the parties to any of said contracts [41] have given any notices of termination of any thereof, and that all of said contracts remain as fully in force and effect now as at the time of the execution thereof; that as yet no work whatever has been done under any of said contracts and that no performance of any of said contracts has taken place, or is now taking place; that said contracts cover all of said Mokelumne River Project of the said defendant district which is east of the west bank of Old River.

XVIII.

That a majority of the voters and not a majority of the electors of said district has approved the construction of said project and has also approved the issuance of bonds of said district to the extent of thirty-nine million dollars ($39,000,000) to pay

for the construction thereof and that said district is now ready to finance the construction of said project by the issuance and sale of said bonds; that, as provided by law, the board of directors of said district has provided and established by resolution that said bonds shall be negotiable in form and of the character known as serial and shall be 39,000 in number, numbered consecutively from 1 to 39,000, both inclusive, of the denomination of $1,000 each, and that said bonds shall bear interest at five per cent per annum payable semi-annually, and that said bonds shall be dated January 1, 1925, and that 975 of said bonds in consecutive numerical order from lower to higher shall mature on January 1st of each of the years 1935 to 1974, inclusive.

That several million dollars of said bonds have been prepared, signed and sold as required by law and the proceeds of said bonds are now being used to pay for work being done [42] under contracts other than the contracts herein described; that the entire contract prices for the performance of said five contracts by said contractors will be paid from proceeds obtained by future sales of said bonds.

XIX.

That at the time of filing the bill of complaint herein there were also applications pending before said Federal Power Commission and said Division of Water Rights by others than said defendant district for the use of the waters of said Mokelumne River for power purposes by the construction of a dam and reservoir at Lancha Plana and that said applications were and are prior in time and right

to said application of said defendant district; that at the time of filing of said bill of complaint said other applications were being heard as part of the same hearing mentioned in Paragraph XII of this amended and supplemental bill of complaint.

XX.

That the plaintiff does *not the* citizenship or residence of any of the defendants other than the said district, the officials thereof, and the defendant Twohy Brothers Company; that the defendant officials of said district are citizens and residents of the State of California and the United States of America and reside within the defendant district.

XXI.

That the amount of each bid of each contractor to whom any contract has been let by said district, as elsewhere herein described, for the construction of any part or portion of said project as provided by contract with the defendant district exceeded the sum or value of $3,000.00, exclusive of interest and costs. [43]

XXII.

That this suit in equity is brought on behalf of plaintiff and of all of the taxpayers for district purposes who own any property within said district which is subject to taxation and is taxed for said district purposes and is brought and prosecuted to protect said district against an illegal application and disposition of the funds and property of the district by the directors and officials thereof; that said taxpayers are entirely too

numerous to be made parties to this suit; that their interest in the matters herein involved and alleged is identical with the interest of plaintiff in said matters; that plaintiff is not an officer of the State of California, or of the United States, or of any department, board, or commission thereof, and does not bring this suit on behalf, or by the authority of any such officer, department, board or commission.

XXIII.

That the allegations made in this amended and supplemental bill with reference to the assessed value of said house and lot, the entire assessed valuation of property within the district, and the taxes heretofore levied by the district against said house and lot are made for the information of the court solely in response to a specific demand for said information by the defendant district and the defendant officials thereof under Equity Rule No. 20; and that said allegations are not made by plaintiff to show that the necessary jurisdictional amount is involved in this suit.

XXIV.

That if any permit or license is issued to defendant [44] district by the said Federal Power Commission or if said district is notified by said Federal Power Commission that a permit or a license will be issued to it then said district by and through the unanimous action of the defendant directors and officials thereof, will forthwith notify said several contractors to proceed with the performance of said five contracts, and thereby the district will

proceed with the construction of its entire project east of the west bank of Old River and will become firmly bound in all events under said contracts before any action can be taken whereby said district, or its directors, or officials, will be prevented from proceeding with said contracts; and thereupon said district will commence to pay said contractors, from time to time as their work progresses, portions of the respective contract prices as said contractors through part performance shall become entitled to said progress payments.

XXV.

That answer hereto under oath is hereby expressly waived.

XXVI.

That the statute under which the defendant district is organized does not authorize or empower said district to give away, sell, or otherwise dispose of any property or funds of the district which are necessary for the purposes and uses of the district and does not authorize or empower said district to subject to a forfeiture or loss or a taking from the district any property or funds of the district which are necessary for the purposes and uses of the district; that if said Federal Power Commission shall issue any permit or license to said defendant district and said defendant shall [45] construct said dam and reservoir and said tunnel and aqueduct under the terms of said contracts, or otherwise, it will be questionable, because of the terms of the Federal Water Power Act and the terms of the statute under which defendant is

organized, *first,* whether or not the said dam, reservoir, tunnel and aqueduct to be constructed under said contracts can be lawfully constructed, owned, maintained, or used as against the United States of America by defendant district, *second,* whether or not any such permit or license will be legal and valid, *third,* whether or not the taking of such permit or license and any compliance therewith and any construction of dam, reservoir, tunnel and conduit thereunder, will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the United States of America.

That plaintiff therefore alleges that the following federal questions are involved herein:

(a) Whether or not the said dam, reservoir, tunnel and aqueduct to be constructed under said contracts can be lawfully constructed, owned, maintained or used as against the United States of America.

(b) Whether or not any such permit or license will be legal and valid.

(c) Whether or not the taking of such permit or license and any compliance therewith and any construction of dam, reservoir, tunnel and conduit thereunder will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the [46] United States of America.

(d) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the permission of the California Debris Commission first had and obtained.

(e) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the consent of the War Department of the United States first had and obtained.

(f) Whether or not the Federal Power Commission can issue any permit or license to said district for the use of said federal lands for the purposes for which said district proposes to use the same.

(g) Whether or not the Federal Power Commission can issue a license under the Federal Water Power Act where the applicant, under its organic act, cannot accept the provisions of Section 14 of the Federal Water Power Act.

(h) Whether or not said Federal Power Commission can issue a license to an applicant which, under its organic act, cannot subject its property to the acquisition, forfeiture, control and appropriation by the United States as provided under the terms of the Federal Water Power Act.

WHEREFORE, plaintiff prays judgment and decree of this court:

1. That any contracts let by said defendant district prior to the time that said district has obtained all of the permits and licenses herein mentioned are void and without effect.

2. That said district shall not let any contracts for the construction of said project or any portion

or portions thereof until said district has obtained all of the licenses and [47] permits herein mentioned.

3. That said Federal Power Commission is unable to issue and the defendant district is unable to accept any license under the Federal Water Power Act for the proposed project of the defendant district and that defendant district shall not construct said Lancha Plana Dam and reservoir and shall not build said conduit therefrom.

4. That the defendant district herein shall not let any contract or contracts or expend any funds for the construction of said project or any part or portion thereof.

5. That the defendant officials of said district shall likewise be enjoined with said district and that the other defendants herein shall likewise be enjoined from entering into any contracts with said district for the construction of said project or any part or portion thereof.

6. That each and all of the five contracts described in the foregoing amended and supplemental bill of complaint are void and invalid and shall not be performed in whole or in part, and that each party to said contracts shall give to the other party thereto the necessary notice of termination, as provided by the terms of said contracts.

7. That the plaintiff herein shall have such other relief as the equity of the case may require and to this Honorable Court may seem meet.

Plaintiff also prays that proper process shall issue forthwith out of and under the seal of this

Honorable Court directed to said defendants, and each of them, commanding them to appear and make answer to this amended and supplemental bill of complaint and to perform and abide by such order and decree herein as to this court may seem required by the [48] principles in equity and good conscience.

S. D. PINE,
Plaintiff.
D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
Attorneys for Plaintiff.

State of California,
City and County of San Francisco,—ss.

On this 5th day of March, 1926, before me came S. D. Pine, the plaintiff named in the foregoing bill, and he, being by me duly sworn, did depose and say:

That he has read the foregoing bill and knows its contents and that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

S. D. PINE.

Subscribed and sworn to before me this 5th day of March, 1926.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

Receipt of the within papers is hereby acknowledged this 5th day of March, 1926.

T. P. WITTSCHEN,
Attorney for Certain Defendants.

[Endorsed]: Filed Mar. 10, 1926. [49]

At a stated term of the Southern Division of the United States District Court for the Northern District of California, held at the courtroom thereof, in the City and County of San Francisco, on Saturday, the twentieth day of March, in the year of our Lord one thousand nine hundred and twenty-six. Present: the Honorable FRANK H. KERRIGAN, District Judge.

[Title of Cause.]

MINUTES OF COURT—MARCH 20, 1926—ORDER DENYING PLAINTIFF'S MOTION FOR LEAVE TO FILE AMENDED AND SUPPLEMENTAL COMPLAINT AND GRANTING DEFENDANTS' MOTION TO DISMISS.

Plaintiff's motion for leave to file amended and supplemental complaint and defendants' motion to dismiss, heretofore argued and submitted, being now fully considered, it is ordered that plaintiff's motion for leave to file amended and supplemental complaint be and the same is hereby denied and defendants' motion to dismiss be and the same is hereby granted, and that a decree of dismissal be entered herein accordingly. [50]

(Title of Court and Cause.)

DECREE DISMISSING ACTION.

This cause having been heard upon plaintiff's bill of complaint and upon motion of defendants East Bay Municipal Utility District and the officials thereof to dismiss the same, and upon plaintiff's motion for leave to file amended and supplemental bill of complaint, and said motion to file said amended and supplemental bill of complaint having been denied and said motion to dismiss said bill of complaint having been sustained and the Court having ordered that the decree of dismissal be entered accordingly,—

NOW, THEREFORE, it is by the Court ORDERED, ADJUDGED and DECREED that said bill of complaint and the above-entitled action be and the same are hereby dismissed.

Dated: April 22d, 1926.

FRANK H. KERRIGAN,
District Judge.

[Endorsed]: Filed and entered Apr. 22, 1926. [51]

(Title of Court and Cause.)

PETITION FOR APPEAL TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

The above-named plaintiff, conceiving himself aggrieved by the decree made and entered on the 22d

day of April, 1926, in the above-entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit, for the reasons specified in the assignment of errors which is filed herewith and he prays that this appeal may be allowed and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
HADSELL, SWEET & INGALLS,
Attorneys for Plaintiff.

Dated: San Francisco, Calif., June ——, 1926.

The foregoing claim of appeal is allowed.

FRANK H. KERRIGAN,
United States District Judge.

Dated: San Francisco, Calif., June 5, 1926.

[Endorsed]: Filed June 5, 1926. [52]

(Title of Court and Cause.)

ASSIGNMENT OF ERRORS.

COMES NOW S. D. Pine and, having asked for an allowance of an appeal from the decree herein against him dismissing his bill of complaint and dismissing the above-entitled action, assigns for error in said decree and the proceedings of the above-entitled court therein the following:

I.

That the Court, in proceeding on the ground that it was not in furtherance of justice to grant plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint, erred in denying said motion.

II.

That the Court, in proceeding upon the ground that it was not within the substantial rights of plaintiff to have plaintiff's motion granted for leave to file his proposed amended and supplemental bill of complaint, erred in denying said motion.

III.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint.

IV.

That the Court erred in granting the motion of defendants, East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said District and of the Board of Directors thereof, and [53] George C. Pardee, as president of the Board of Directors of said District to dismiss plaintiff's bill of complaint.

V.

That the Court erred in dismissing plaintiff's bill of complaint.

VI.

That the Court erred in dismissing the action.

VII.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollors ($3,000.00).

VIII.

That the Court erred in dismissing plaintiff's bill of complaint on the ground that the matter in controversy does not arise under the laws of the United States.

IX.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that the defendant East Bay Municipal Utility District can legally take and act under a license granted by the Federal Power Commission under the Federal Water Power Act.

X.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that a license issued to the defendant East Bay Municipal Utility District by the Federal Power Commission under the terms of the Federal Water Power Act would not be invalid.

XI.

That the Court erred in dismissing plaintiff's bill [54] of complaint upon the ground that the construction of dam and reservoir upon lands of the United States by the defendant East Bay Municipal

Utility District under a license issued to said defendant District by the Federal Power Commission under the terms of the Federal Water Power Act would not be a waste of funds and property of the District.

XII.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that this suit is brought by plaintiff for plaintiff's direct benefit and is not brought for and on behalf of and to protect the defendant East Bay Municipal Utility District.

XIII.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that even if a license issued to the defendant East Bay Municipal Utility District by the Federal Power Commission under the terms of the Federal Water Power Act were invalid, the construction of a dam and reservoir by the defendant District upon lands of the United States, as proposed by project of the district, would not be a waste of the funds and property of the District.

XIV.

That the Court erred in dismissing plaintiff's bill of complaint upon the ground that the question whether or not the construction of a dam and reservoir by the defendant East Bay Municipal Utility District on lands of the United States involves a waste of the funds and property of the District does not depend upon or arise under the laws of the United States.

XV.

That the Court erred in dismissing plaintiff's bill of [55] complaint upon the ground that it does not state facts sufficient to constitute a valid cause of action in equity.

XVI.

That the Court erred in dismissing the action upon the various grounds which are specified in Paragraphs VII to XV inclusive of this assignment of errors as the grounds upon which the Court dismissed plaintiff's bill of complaint.

XVII.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that said proposed amended and supplemental bill of complaint does not state facts sufficient to constitute a valid cause of action in equity.

XVIII.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the matter in controversy does not exceed, exclusive of interest and costs, the sum or value of Three Thousand Dollars ($3,000.00).

XIX.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the matter in controversy does not arise under the laws of the United States.

XX.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the defendant East Bay Municipal Utility District can legally take and act under a license granted by the Federal Power Commission under the terms of the Federal [56] Water Power Act.

XXI.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the license issued to the defendant East Bay Municipal Utility District by the Federal Power Commission under the terms of the Federal Water Power Act would not be invalid.

XXII.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the construction of a dam and reservoir upon lands of the United States by the defendant East Bay Municipal Utility District under a license issued to said defendant District by the Federal Power Commission under the terms of the Federal Water Power Act would not be a waste of the funds and property of the district.

XXIII.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that

this suit is brought by plaintiff for plaintiff's direct benefit and is not brought for and on behalf and to protect the defendant East Bay Municipal Utility District.

XXIV.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that even if a license issued to the defendant East Bay Municipal Utility District, by the Federal Power Commission under the terms of the Federal Water Power [57] Act were invalid the construction of a dam and reservoir by the defendant District upon lands of the United States, as proposed by the project of the district, would not be a waste of the funds and property of the district.

XXV.

That the Court erred in denying plaintiff's motion for leave to file his proposed amended and supplemental bill of complaint upon the ground that the question whether or not the construction of a dam and reservoir by the defendant East Bay Municipal Utility District upon lands of the United States involves a waste of the funds and property of the district does not depend upon or arise under the laws of the United States.

D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
HADSELL, SWEET & INGALLS,
Attorneys for Plaintiff.

[Endorsed]: Filed June 5, 1926. [58]

(Title of Court and Cause.)

ORDER ALLOWING APPEAL AND FIXING AMOUNT OF BOND ON APPEAL.

WHEREAS, heretofore on the 22d day of April, 1926, the above-entitled court, on motion of the defendants above named, namely: East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of the East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said district and of the Board of Directors thereof, and George C. Pardee, as president of the Board of Directors of said District, did make and enter its decree wherein and whereby the Court ordered, adjudged and decreed that plaintiff's bill of complaint and the above-entitled action be and the same was thereby dismissed; and

WHEREAS the above-named plaintiff has filed with this Court in the above-entitled matter his petition for an appeal from said order and decree to the United States Circuit Court of Appeals for the Ninth Circuit and with said petition has filed an assignment of errors,—

NOW, THEREFORE, IT IS HEREBY ORDERED that an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from said decree be and the same is hereby allowed.

IT IS FURTHER ORDERED that the bond on appeal will be in the penalty of Two Hundred and

Fifty Dollars to answer all costs if appellant fail to make his plea good.

FRANK H. KERRIGAN,
United States District Judge.

Dated: San Francisco, Calif., June 5, 1926.

[Endorsed]: Filed June 5, 1926. [59]

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS, that we, S. D. Pine, as principal, and Union Indemnity Company, a corporation organized and existing under and by virtue of the laws of the State of Louisiana and authorized to do and doing business in the State of California under the laws thereof, as surety, are held and firmly bound unto East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said District and of the Board of Directors thereof, and George C. Pardee, as president of the Board of Directors of said District, in the full and just sum of Two Hundred Fifty Dollars ($250.00) to be paid to the said East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of East Bay Municipal Utility District,

John H. Kimball, individually and as secretary of said District, and of the Board of Directors thereof, and George C. Pardee, as president of the Board of Directors of said District, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, assigns, and heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 8th day of June, in the year of our Lord One Thousand Nine Hundred and Twenty-six.

WHEREAS, lately at a District Court of the United States [60] for the Northern District of California, in a suit depending in said court between S. D. Pine, as plaintiff, and East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said District and of the Board of Directors thereof, George C. Pardee, as president of the Board of Directors of said District, Stephen E. Keiffer, Twohy Bros., T. E. Connolly, Smith Brothers, Pelton Company, Charles K. Thompson, Lynn S. Atkinson, Jr., First Doe, Second Doe, Third Doe, Fourth Doe, Fifth Doe, Sixth Doe, Seventh Doe, John Doe Company, Richard Roe Company, Sam Stowe Company, James Roe Company and Thomas Doe Company, defendants, a judgment was rendered against the said S. D. Pine and the said

S. D. Pine having obtained from said court an appeal in said suit to reverse the judgment in the aforesaid suit, and a citation directed to the said East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said District and of the Board of Directors thereof, and George C. Pardee as president of the Board of Directors of said District, citing and admonishing them to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, that if the said S. D. Pine shall prosecute said appeal to effect and answer all costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force [61] and virtue.

S. D. PINE.

UNION INDEMNITY COMPANY.

[Seal] By GAULDEN L. SMITH,

Agent and Attorney-in-fact.

Acknowledged before me the day and year first above written.

MINNIE V. COLLINS.

State of California,
City and County of San Francisco,—ss.

On this 8th day of June, in the year one thousand nine hundred and twenty-six, before me,

Minnie V. Collins, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared S. D. Pine, known to *be* to be the person described in, whose name is subscribed to, and who executed the within and annexed instrument, and he acknowledged to *be* that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, at my office, in the said City and County of San Francisco, the day and year in this certificate first above written.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California. [62]

State of California,
City and County of San Francisco,—ss.

On this 8th day of June, in the year one thousand nine hundred and twenty-six, before me, Minnie V. Collins, a notary public in and for said city and county, residing therein, duly commissioned and sworn, personally appeared Gaulden L. Smith, known to me to be the agent and attorney-in-fact of Union Indemnity Company, the corporation described in and that executed the within instrument, and also known to me to be the person who executed it on behalf of the corporation therein named, and he acknowledged to me that such corporation executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal at my office, in the City and County of San Francisco,

the day and year in this certificate first above written.

[Seal] MINNIE V. COLLINS,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed June 8, 1926. [63]

(Title of Court and Cause.)

PRAECIPE FOR RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

YOU ARE HEREBY REQUESTED to prepare a transcript of record in the above-entitled action to be filed in the United States Circuit Court of Appeals for the Ninth Circuit pursuant to an appeal heretofore allowed in the above-entitled action and to include in said transcript of record the following and no other papers or exhibits, to wit:

1. Plaintiff's complaint in equity to enjoin the letting of contracts.
2. Notice of motion of defendants, East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of the East Bay Municipal Utility District, John H. Kimball, individually and as secretary of said district and of the Board of Directors thereof, and George C. Pardee, as president of the Board of Directors of said Dis-

trict, for order dismissing plaintiff's complaint.

3. Motion of said defendants to dismiss the suit, and affidavit of George C. Pardee, attached thereto.
4. Notice of said defendants of motion for further and better particulars under Equity Rule No. 20.
5. Motion of said defendants for further and better particulars under Equity Rule No. 20.
6. Notice of motion by plaintiff for leave to file amended and supplemental bill of complaint. [64]
7. Motion of plaintiff for leave to file amended and supplemental bill of complaint.
8. Plaintiff's proposed amended and supplemental bill of complaint in equity to enjoin the letting or performance of contracts, as same is attached to plaintiff's motion for leave to file the same.
9. Minute order of Court denying plaintiff's motion for leave to file amended and supplemental bill of complaint and granting motion of said defendants to dismiss the action.
10. Decree of Court dismissing action.
11. Plaintiff's petition for appeal to the United States Circuit Court of Appeals for the Ninth Circuit.
12. Plaintiff's assignment of errors.
13. Order allowing appeal and fixing amount of

bond on appeal also bond on appeal and this praecipe.

14. Citation to said defendants to appear on appeal.

D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
Attorneys for Plaintiff and Appellant.

Dated: San Francisco, Calif., June 8th, 1926.

Receipt of a copy of the within request for preparation of record on appeal is hereby admitted this 11th day of June, 1926.

T. P. WITTSCHEN,
Attorney for Defendants Named Therein.

[Endorsed]: Filed June 14, 1926. [65]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing sixty-five (65) pages, numbered from 1 to 65, inclusive, to be a full, true and correct copy of the record and proceedings as enumerated in the praecipe for record on appeal, as the same remain on file and of record in the above-entitled suit, in the office of the Clerk of said court, and that the same constitutes the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $29.75; that the said amount

was paid by the plaintiff and that the original citation issued in said suit is hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 23d day of June, A. D. 1926.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California. [66]

CITATION.

United States of America,—ss.

The President of the United States, to East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, Individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, Individually and as Secretary of Said District and of the Board of Directors Thereof, and George C. Pardee, as President of the Board of Directors of Said District, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the Clerk's office of the United States District Court for the Northern District of California, wherein S. D. Pine is appellant and you are appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why

speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable FRANK H. KERRIGAN, United States District Judge for the Northern District of California, this 5th day of June, A. D. 1926.

FRANK H. KERRIGAN,
United States District Judge.

Received a copy of the within citation this 11th day of June, 1926.

T. P. WITTSCHEN,
Solicitor for Defendants.

[Endorsed]: Filed June 12, 1926. [67]

[Endorsed]: No. 4890. United States Circuit Court of Appeals for the Ninth Circuit. S. D. Pine, Appellant, vs. East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer, and Alfred Latham, Individually and as Directors of the East Bay Municipal Utility District, John H. Kimball, Individually and as Secretary of Said District, and of the Board of Directors Thereof, and George C. Pardee, as President of the Board of Directors of Said District, Appellees. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, Second Division.

Filed June 23, 1926.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the East Bay Municipal Utility District, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

APPELLANT'S OPENING BRIEF.

D. HADSELL,
JOE G. SWEET,
E. A. INGALLS,
Insurance Exchange Building, San Francisco.
Attorneys for Appellant.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the East Bay Municipal Utility District, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

APPELLANT'S OPENING BRIEF.

I.

STATUS OF PLEADINGS.

On September 25, 1925, the appellant filed his bill in the District Court to enjoin the defendants East Bay Municipal Utility District, George C. Pardee, Grant D. Miller, David P. Barrows, James H. Boyer and Alfred Latham, individually and as directors of the district, John H. Kimball, individually and as

secretary of the district and of its Board of Directors, and George C. Pardee as president of the Board of Directors of the district, from entering into certain contracts with the other defendants. On February 8, 1926 the defendants whom we have just named served and filed a notice of motion and a motion to dismiss appellant's bill of complaint. Also on February 8, 1926, the same defendants served and filed a notice of motion and a motion for "further and better particulars under equity rule No. 20". Thereafter, on March 5, 1926, the appellant served and on March 10, 1926 filed a notice of motion and a motion for leave to file an amended and supplemental bill of complaint; and the proposed amended and supplemental bill was attached to the motion. The defendants' motions were noticed for February 15, 1926; the appellant's motion was noticed for March 15, 1926; and all motions were heard together on the latter date. On March 20, 1926, the District Court made and entered its minute order as follows (Trans. page 55):

"Plaintiff's motion for leave to file amended and supplemental complaint and defendants' motion to dismiss, heretofore argued and submitted, being now fully considered, it is ordered that plaintiff's motion for leave to file amended and supplemental complaint be and the same is hereby denied and defendants' motion to dismiss be and the same is hereby granted, and that a decree of dismissal be entered herein accordingly."

The minute order was followed by the decree on April 22, 1926, as follows (Trans. page 56):

"This cause having been heard upon plaintiff's bill of complaint and upon motion of defendants East Bay Municipal Utility District and the officials thereof to dismiss the same, and upon plaintiff's motion for leave to file amended and supplemental bill of complaint, and said motion to file said amended and supplemental bill of complaint having been denied and said motion to dismiss said bill of complaint having been sustained and the Court having ordered that the decree of dismissal be entered accordingly,

Now, therefore, it is by the Court ordered, adjudged and decreed that said bill of complaint and the above-entitled action be and the same are hereby dismissed."

The district judge rendered no opinion. So we do not know officially why the District Court denied appellant's motion for leave to file his proposed amended and supplemental bill. But Equity Rule No. 28 in part reads thus:

> "After pleading filed by any defendant, plaintiff may amend only by consent of the defendant or leave of the Court or judge."

And Equity Rule No. 34 reads thus:

> "Upon application of either party the Court or judge may, upon reasonable notice and such terms as are just, permit him to file and serve a supplemental pleading, alleging material facts occurring after his former pleading, or of which he was ignorant when it was made, including the judgment or decree of a competent Court rendered after the commencement of the suit, determining the matters in controversy or a part thereof."

Therefore we must and do assume that in denying appellant's motion the District Court did not act on any technical grounds *but rather acted on the ground that the motion of the defendants to dismiss appellant's bill would be equally good against appellant's proposed amended and supplemental bill*—in which event appellant's motion should be denied as matter of course, though otherwise it should be granted and the defendants given leave to plead to the new bill.

Accordingly in the statement of facts and in the arguments which follow we treat this case as though appellant's proposed amended and supplemental bill were the original bill and the defendants' motion to dismiss were directed to it.

The motion to dismiss admits the allegations in the bill and therefore the following statement of facts is merely a summary of the pertinent allegations in the proposed amended and supplemental bill.

II.

STATEMENT OF FACTS.

The plaintiff is a citizen of California, and a resident of the defendant district. He is also a registered elector, owner of real estate and a tax-payer within the district. He has paid taxes to this district. The taxes which he has paid are small; and we will admit, as perhaps we must admit on our pleading, that the total taxes which plaintiff will ever have to pay because of the proposed operations of the district under challenge in this suit will never reach the sum of $3000.

The defendant, East Bay Municipal Utility District, is organized under an act of the California legislature approved May 23, 1921 and found in the statutes for that year at page 245. The district's organization dates from May 22, 1923. The act applies primarily to incorporated territory. In this instance the defendant district is comprised wholly of incorporated areas—principally Alameda, Oakland, Berkeley and Richmond on the east bay-shore of San Francisco Bay. The legislature at the same session passed an almost identical act for use in unincorporated areas to accomplish the same purposes. (Statutes 1921, page 906.) This latter act has been before our Supreme Court in *In re Issuance of Bonds of Orosi Public Utility District,* 69 Cal. Dec. 447. Therein the Court, in determining the nature of these districts, declared that they are not mere state agencies for limited purposes like our reclamation and irrigation districts but are true municipal corporations. We quote from page 456:

> "The creation of municipal corporations does not have for its sole object the formation of political subdivisions of the state for governmental purposes, but there is also the association of the members of the particular community for the administration of their local business and affairs in matters largely outside of the sphere of government as such. It is quite apparent to us that the legislature had in view such association of the people living in the outlying districts when it enacted the statute providing for the formation of public utility districts in the unincorporated territory of the state."

In other litigation the present defendant has claimed, under this decision, to be a municipal cor-

poration. So we assume that this will not be disputed.

After organization the district proceeded under its statute to develop a water supply for the district. The district's engineer proposed the construction of a dam on the Mokelumne River at a point east of Stockton in the lower hills above the town of Lancha Plana whereby large quantities of water would be impounded; and he further proposed the installation of a large conduit to carry the water to small reservoirs in the hills within or adjacent to the district. In this connection we allege:

"That said project * * *, by and through the construction of said dam, involves the appropriation and use of several hundred acres of lands belonging to the United States of America * * * that said dam, if constructed, will be located upon said lands of the United States and said reservoir above said dam will also be partly located upon said lands of the United States; that the only available damsite which is suitable for the purposes of the district and for the construction of a dam on the Mokelumne River to provide said reservoir at said reservoir-site is on said land of the United States; that the construction of any dam on said Mokelumne River which will create said reservoir will necessarily include said lands of the United States in said reservoir." (Trans. pages 36 and 37.)

The entire reservoir at Lancha Plana will comprise about 2000 acres of land. (Trans. page 34.)

The directors of the district adopted the engineer's proposals and submitted to the voters in the district the question whether or not this project should be constructed and bonds issued to finance it. With the able help of our Supreme Court the voters of the district gave the necessary affirmation. (See *In the Matter of the Validation of the East Bay Municipal Utility District Water Bonds of 1925, etc.,* Cal. Dec. Vol. 70, page 270.)

The district's officials then called for bids on various portions of the project. They specified that the bids should be opened on September 4, 1925, and the contracts awarded on September 25, 1925. One portion of the project for which they called for separate bids was "items 1 to 16 inclusive, covering the Lancha Plana Dam, outlets through dam, including gates and power house * * *, the same being Schedule 10 of Plan 1 of the specifications covering said work." (Trans. page 42.) The defendant Lynn S. Atkinson bid on this portion of the project. On September 25, 1925, while the bids were pending and before any contracts thereon were awarded the plaintiff filed his bill in this suit and served process upon the defendant district and its officials. (Trans. page 41.) The district, its officials, and Atkinson (and also others) were made parties to the original bill. (Trans. pages 1 and 2.) Yet, at a meeting later on that day, the district's directors awarded to defendant Atkinson the contract on the above specified portion of the project.

Meanwhile the district had applied to the Federal Power Commission, under the Federal Water Power

Act, for a permit and license to construct the dam, power house and reservoir upon the lands of the United States. When the district awarded the contract to Atkinson this application was undetermined. (Trans. page 37.) Consequently, when on November 6, 1925 (Trans. page 42) the district and Atkinson finally signed the contract between them they inserted this paragraph:

"Anything in said specifications to the contrary notwithstanding the work provided for by this contract shall be commenced by second party within thirty days after but not before receipt from the district in writing of notice so to do in conformity with the provisions of this paragraph and the period within which the work shall be completed as provided in the said specifications shall begin with the receipt by second party of such notice. In view of the fact that the application of the district for the use of the lands upon which said dam is to be constructed is still pending and undecided before the Federal Power Commission and in view of the further fact that it may become necessary and desirable to make some substantial alterations in the plans and specifications for said dam, it is distinctly understood and agreed that the said district need not give the said notice in writing to begin said work for a period of 12 months from and after the date hereof and during said period of twelve months may at its option terminate and cancel this agreement without liability in any way to the said second party. If the said notice to begin said work be not given within said period of twelve months, then in that event at the expiration of said time the

said contractor may at his option terminate and cancel this agreement without liability to the district."

We note that the twelve months' period has not elapsed. The *contract price* was $3,081,378.00.

Other important facts are:

(a) The *bid* of Atkinson exceeded $3000. (Trans. page 48, Par. XXI.)

(b) His contract remains in full force and effect and no notice of termination of it has been given; but no work has been done under it. (Trans. page 46.)

(c) (Trans. pages 48 and 49, Par. XXII.) We here allege:

"That this suit in equity is brought on behalf of plaintiff and of all of the taxpayers for district purposes who own any property within said district which is subject to taxation and is taxed for said district purposes and is brought and prosecuted to protect said district against an illegal application and disposition of the funds and property of the district by the directors and officials thereof; that said taxpayers are entirely too numerous to be made parties to this suit; that their interest in the matters herein involved and alleged is identical with the interest of plaintiff in said matters."

(d) If any permit or license is issued to the defendant district by the Federal Power Commission then the district will notify the defendant Atkinson to proceed with performance of his contract and payments to him thereunder will begin. (Trans. page 49, Par. XXIV.)

(c) (Trans. page 50, Par. XXVI.) We here allege:

"That the statute under which the defendant district is organized does not authorize or empower said district to give away, sell, or otherwise dispose of any property or funds of the district which are necessary for the purposes and uses of the district and does not authorize or empower said district to subject to a forfeiture or loss or a taking from the district any property or funds of the district which are necessary for the purposes and uses of the district. * * *"

III

FURTHER FACTS.

Both the original and the proposed amended and supplemental bills contain many other allegations of facts which present important issues of law. But on this appeal such facts and the issues of law which they raise are immaterial. We have alleged them solely on the principle that once the Federal Court has laid its hold on a controversy because some phase of the dispute or the parties thereto give it jurisdiction it will hear and determine all issues.

IV

STATEMENT OF FEDERAL QUESTIONS.

Our statement of the Federal questions that this suit involves is (Trans. pages 50-52):

"That if said Federal Power Commission shall issue any permit or license to said defendant district and said defendant shall construct said dam and reservoir and said tunnel and aqueduct under the terms of said contracts, or otherwise, it will be questionable, because of the terms of the Federal Water Power Act and the terms of the statute under which defendant is organized, *first,* whether or not the said dam, reservoir, tunnel, and aqueduct to be constructed under said contracts may be lawfully constructed, owned, maintained, or used as against the United States of America by defendant district, *second,* whether or not any such permit or license will be legal and valid, *third,* whether or not the taking of such permit or license and any compliance therewith and any construction of dam, reservoir, tunnel and conduit thereunder, will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the United States of America.

That plaintiff therefore alleges that the following Federal questions are involved herein:

(a) Whether or not the said dam, reservoir, tunnel and aqueduct to be constructed under said contracts can be lawfully constructed, owned, maintained or used as against the United States of America.

(b) Whether or not any such permit or license will be legal and valid.

(c) Whether or not the taking of such permit or license and any compliance therewith and any con-

struction of dam, reservoir, tunnel and conduit thereunder will not unlawfully subject the property and funds of the district, which are necessary for the purposes and uses of the district, to a forfeiture or loss, or a taking from the district through the United States of America.

(d) Whether or not the proposed conduit can be built across said San Joaquin Delta as herein described without the permission of the California Debris Commission first had and obtained.

(e) Whether or not the proposed conduit can be built across the San Joaquin Delta as herein described without the consent of the War Department of the United States first had and obtained.

(f) Whether or not the Federal Power Commission can issue any permit or license to said district for the use of said federal lands for the purposes for which said district proposes to use the same.

(g) Whether or not the Federal Power Commission can issue a license under the Federal Water Power Act where the applicant, under its organic act, cannot accept the provisions of Section 14 of the Federal Water Power Act.

(h) Whether or not said Federal Power Commission can issue a license to an applicant which, under its organic act, cannot subject its property to the acquisition, forfeiture, control and appropriation by the United States as provided under the terms of the Federal Water Power Act."

On this appeal we eliminate (d) and (e) from consideration.

V

STATEMENT OF LEGAL ISSUES AND SPECIFICATION OF ERRORS.

In the brief of the defendant district in the lower Court the district's counsel stated the issues on defendant's motion to dismiss in these words:

(a) "That the facts alleged do not constitute a valid claim in equity."

(b) "That the complainant is not a proper party in interest."

(c) "That the matter in controversy does not exceed the sum of $3000."

(d) "That the matter in controversy does not arise under the constitution or laws of the United States."

We have not followed his order of statement, however. For, as we shall see, the last three issues go to the general question whether or not the Federal Courts have jurisdiction of this controversy, and that question cannot be answered unless we have first ascertained whether or not the plaintiff has stated a cause of action in equity and what the nature of such cause of action is, if one exists. For this reason we will discuss the issues in the above order.

Any specifications of errors, in this brief, as required by the rules of this Court, can do no more than say that, since the issues on the motion were as defendants' counsel stated them and since the order granting the motion to dismiss was general, the conclusion must be that the motion to dismiss was granted upon all four grounds and therefore the Court erred in deciding each of these four issues against

this appellant. The assignment of errors in the transcript covers, in various ways, these four issues (Trans. pages 58-63) and we therefore incorporate herein by reference our assignment of errors which we filed on taking this appeal.

VI.

FIRST QUESTION.

DO THE FACTS ALLEGED CONSTITUTE A VALID CLAIM IN EQUITY?

Our case may be shortly stated in these propositions:

(a) The statute under which the defendant district is organized does not authorize or empower the district to give away, sell or otherwise dispose of any property or funds of the district which are necessary for the purposes and uses of the district and does not authorize or empower the district to subject to a forfeiture or loss or a taking from the district any property or funds of the district which are necessary for the purposes and uses of the district.

(b) The entire dam, reservoir, diversion works and conduit of the district's Mokelumne River project are necessary for the purposes and uses of the district.

(c) The Mokelumne River project of the defendant district, as proposed by its engineer, adopted by its Board of Directors, approved by its voters, and included in the Atkinson contract, is incapable of use unless the entire dam and a portion of the reservoir and a part of the diversion works are located upon

lands of the United States within the jurisdiction of the Federal Power Commission.

(d) A license from the Federal Power Commission to the defendant district will constitute a contract between them.

(e) The terms of any license from the Federal Power Commission to the defendant district will and must provide for a sale and other disposition, and for a forfeiture and loss of property and funds of the district which are necessary for its purposes and uses.

(f) The construction of the dam and diversion works on lands of the United States, even though not done under any license from the Federal Power Commission, will entail a disposition, forfeiture and loss of property and funds of the district which are necessary for its purposes and uses.

(g) What the district proposes to do, by and through its contract with Atkinson and under its license from the Federal Power Commission, will be a violation of its organic act in disbursing the funds of the district and also will be a waste of the district's funds.

(h) Any license from the Federal Power Commission to the district will be invalid because of the inability of the commission to issue a license upon the only terms which the district may lawfully accept and because of the inability of the district to take a license upon the only terms which the commission may lawfully grant.

So of each of these propositions in their order:

(a) The Statute Under Which the Defendant District is Organized Does Not Authorize or Empower the District to Give Away, Sell or Otherwise Dispose of Any Property or Funds of the District Which Are Necessary for the Purposes and Uses of the District and Does Not Authorize or Empower the District to Subject to a Forfeiture or Loss or a Taking From the District Any Property or Funds of the District Which Are Necessary for the Purposes and Uses of the District.

Section 12 of the District Organic Act specifies the powers which the district may exercise. Among them only three bear on our question. They are:

> "FOURTH. To take by grant, purchase, gift, devise, or lease or otherwise acquire, and to hold and enjoy, and to lease or dispose of, real and personal property of every kind within or without the district *necessary to the full or convenient exercise of its powers.*"
>
> "FIFTH. To acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein, without preference to such municipalities, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter; and to do all things necessary or convenient to the full exercise of the powers herein granted; also to purchase any of the commodities or services aforementioned from any other utility district, municipality, or private company, and distribute the same. Whenever there is a surplus of water, light, heat or power above that which may be required by such inhabitants or municipalities within the district, such district shall have power to sell or otherwise dispose of such surplus outside of the district to persons, firms, and public or private corporations or municipalities outside said district."

"TENTH. To make contracts, and to employ labor, and to do all acts necessary *and convenient for the full exercise of the powers herein in this act granted.*"

A district of this sort is not organized to buy, own or sell property or to make contracts. With this district such things are only a means to an end. Therefore, such things are only justified to the extent that they are a means to an end. Sub. 4th of Section 12 expresses this idea by granting the power of the district to buy, own and sell property in those cases where the exercise of that particular power is *"necessary to the full or convenient exercise of its powers"*; and Sub. 10th of Section 12 further expresses the same idea by granting power to the district to make contracts in those cases where the exercise of that particular power is *"necessary and convenient for the full exercise of the powers herein in this act granted." The consequence is that we have to look to other portions of the act to determine what main powers are possessed by the district which may be so aided by the exercise of the subsidiary powers granted to it by Subdivisions 4th and 10th of Section 12.*

The main power and purpose of the district is declared in Sub. 5th of Section 12 in these clear words:

"to acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein, without preference to such municipalities, with light, water, power, heat, transportation, telephone service, or other means of communication, or means for the disposition of garbage, sewage, or refuse matter."

Thus it is the bounden duty and purpose of the district to acquire, by construction or purchase or by both, and thereupon to operate, for the benefit of the district, its inhabitants, businesses, industries, schools and all other activities in need of such service, utilities supplying light, water, power, etc.

Sec. 15, Sub. 1 of the district's Organic Act also provides:

> "That no public utility shall ever be acquired or contracted for unless the acquisition of said utility has first been approved by a majority of the electors of said district."

Now, with these premises before us, let us suppose that the district, by one means and another, has acquired and has begun to operate a system of waterworks supplying the people in the district with water. Let us suppose further that the directors eventually get tired of their job and decide to sell the system to someone who will cease to supply the people in the district with water and who will turn the works to similar service in another locality. Could the directors legally do so? Most certainly not. Such sale of the works would subvert every purpose of the district's Organic Act. It would betray the trust which the statute imposes upon the directors. Such disposition of the property of the district would not be "necessary to the full or convenient exercise of its powers" and for that reason would not be authorized by Sub. 4th of Section 12.

If, now, we carry this idea further back and assume that the directors propose to acquire by construction

or purchase or both such system of waterworks under a contract *whereby, under a number of different contingencies and finally at a definite date, someone can take the works from the district at a price, can cease to supply the people in the district with water, and can turn the works to similar service in another locality,* must we not equally say that such use of the funds of the district will subvert every purpose of the district's Organic Act? We most certainly must. Such disposition of the funds of the district would not be "necessary and convenient for the full exercise of the powers herein in this act granted"; and for that reason would not be authorized by Sub. 10th of Section 12.

This conclusion is very strongly supported by other clauses in the statute which we have already quoted. One clause is (Sec. 15, Sub. 1) that a public utility may be acquired only on a vote of a majority of the electors of the district. But if such vote is necessary for the acquirement of this utility it can hardly be said that the statute intends that the Board of Directors may dispose of the utility if it pleases to do so. Rather, the necessary implication is that when a utility has been acquired under a vote of the people the Board of Directors is without power to dispose of it. This conclusion has further confirmation in that part of Sub. 5th of Section 12, which says:

> "Whenever there is a *surplus of water,* light, heat or power *above that which may be required by such inhabitants or municipalities within the district,* such district shall have power *to sell or otherwise dispose of such surplus outside of the*

district to persons, firms and public or private corporations, or municipalities outside said district."

Where the statute grants a special authority to dispose of surplus water or power to outsiders it must do so on the ground that otherwise the district cannot make such disposition. *But if the district cannot dispose of the surplus without special authority certainly it cannot dispose either of needed water or power or of the property which produces such needed water or power unless the statute also grants the district special authority to that effect.* While, under this statute, special authority is granted for disposition of surplus away from the district there is no such special authority granted for like disposition of needed water or power or of the property which produces them. Hence we must conclude that authority to accomplish the latter does not exist.

In this very connection it is important to note that Sub. 5th of Section 12, wherein we find the main power and purpose of the district, *does not give any authority to dispose of the district's works.* That clause gives only authority *to acquire.* The words are, "to acquire, construct, own, operate, control or use * * * works," etc. This indicates that it is not one of the powers or purposes of the district "to lease or dispose of" works, etc.

Every step in the foregoing line of reasoning is affirmed by the authorities.

The principles which we invoke are well stated in a South Dakota case. We here put this case first

because the charter of Huron, S. D., had in it certain clauses nearly identical with the clauses in our statute. The case is *Huron Waterworks Co. v. Huron* (S. D.), 30 L. R. A. 848, at 854. The city's charter provided:

> "Section 1 provides: 'That the city of Huron * * * shall have power to make all contracts necessary to the exercise of its corporate powers, to purchase, hold, lease, transfer, and convey real and personal property for the use of the city * * * and to exercise all the rights and privileges pertaining to a municipal corporation.'
>
> Section 7, pt. 8, provides as follows: 'The city council shall have power * * * to organize and support fire companies, hook and ladder companies, and provide them with engines and all apparatus for extinguishment of fire * * * to construct and furnish reservoirs, wells, cisterns, aqueducts, pumps, and other apparatus for protection against fires, and to establish regulations for the prevention and extinguishment of fires.'
>
> Section 7, pt. 9, provides as follows: 'The city council shall have power * * * to construct and maintain waterworks and make all needful rules and regulations concerning the distribution and use of water supplied by such waterworks.' "

Two excerpts from the court's opinion are enough. Page 857:

> "From this examination of the authorities, we conclude that there is no distinction between the nature of waterworks property owned and held by the city, and public parks, squares, wharves, quarries, hospitals, cemeteries, city halls, courthouses, fire engines, and apparatus, and other property owned and held by the city for public use. All such property is held by the municipality as a trustee in trust for the use and benefit of the citizens of the municipality, and it cannot be sold or disposed of by the common council of the city, except under the authority of the state legis-

lature. Such property, as before stated, is private property, in the sense that the municipality cannot be deprived of it without compensation, no more than can a private corporation be deprived of its property by law-making power. But such property is so owned and held by the municipality as the trustee of the citizens of the municipality for the use and benefit of such citizens. It has been acquired by the corporation at the expense of the taxpayers of the city, for their use and benefit, and the law will not permit the corporation to divest itself of the trust, nor to deprive the citizens of their just rights as beneficiaries in the same."

Page 858:

"The common council of the city of Huron was, to a certain extent, at least, but agent of the corporation, and possessed only such authority as was conferred upon it by its charter. While it probably possessed the power of disposing of strictly private property held by the city, and not held for public use, and therefore not charged with a trust, it did not possess the power to dispose of the city waterworks constructed by the corporation and held for public use; *and the power conferred by the first section of its charter to sell and dispose of the property of the city must be held to be limited to that class of property held as strictly private property, and not charged with any public use.*"

Another case is *Ogden City v. Bear Lake and River Waterworks and Irrigation Co.* (Utah), 41 L. R. A. 305, at 309. A rather lengthy quotation from the opinion makes exposition here unnecessary. The Court said:

"As to the first proposition in the order we will consider them. Was the City of Ogden authorized to enter into a contract transferring its rights

to the waters and system in question to the defendants or either of them? Ogden City was a public corporation, and its authority was limited to such powers as were expressly granted by statute and such as might be necessary to those expressly given. Undoubtedly, water distributed to a city and its inhabitants is devoted to a public use, and the entire system, whether consisting of reservoirs, conduits, pipes, or other means used to accomplish the delivery, is also dedicated to the same use. The charter of Ogden City contained a provision authorizing it to 'purchase, receive, hold, sell, lease, convey and dispose of property real and personal for the benefit of the city.' *No authority is expressly or by necessary implication given to convey, transfer, or lease to a private corporation, or other person, property used by the public—dedicated to a public use.* The control and management of property dedicated to the use of the people of a city is given for their benefit, not for the individual benefit of the public authorities. A public corporation is not a legal entity or person, whose interests can be considered separate and apart from its people. It is but an instrumentality created and perpetuated for their benefit. Its officers as such are nothing more than agents of the public. They must act within the scope of their authority. Their acts outside are perfectly impotent from a legal standpoint. Their authority and control of the property and rights of the corporation used by the people are not given them for the purpose of being transferred to a private corporation, or anyone else, to enable them in that way to deprive the public of its use; nor can the city authorities divest the city of its rights to it, and in that way rid themselves of the management and control of it for the city and its inhabitants. They cannot deprive the public of the benefit of property rights or powers affected with a public use by conveying or leasing it to others, unless their charter specially authorizes it, though such other corporation or person

may undertake to give the public the use of it for compensation deemed reasonable. Such officers are selected by the people, to whom they are responsible, and they may be removed and superseded by others. While the use of public property is controlled and managed by public officers, whatever compensation is received goes into the public treasury; and, if the compensation exceeds the actual cost the public gets the benefit of the surplus or net income. When property whose use is devoted to the public is conveyed or leased to private corporations, though a contract may require its use to be given to the public for a reasonable remuneration, the public, to a great extent, loses its control over it, and any net income realized goes into the hands and pockets of private parties. In fact, such parties cannot give the use of their property to the public for the actual cost of it, and the actual expense of the business, as in this case. They must have profits, and it is to the interest of such parties to make the profits or net income as large as public officials will consent to make it. The people usually get fleeced when the city places its waterworks in the hands of private parties. Public-spirited men are not at all times free from the undue influence of self-interest. Their disposition to favor the public is not equal to their inclination to favor themselves. Such are the leanings of human nature, even when engaged in public-spirited projects. A city sometimes has on hand personal and real property not devoted to the use of the public. Fire engines, horses, or other personal property, may become unsuited to the use for which they were designed, and be replaced, and ceased to be used. Public buildings may become unfit for the public use, and for sufficient reasons the city may not wish to build on the same lot; and such buildings, and the lots upon which they stand, may be no longer used by the public. The city from time to time may have other classes of property that have ceased to be

used, or is not used by the public. All such property of a municipal corporation, not devoted to the public use, may be sold or leased under the general authority to sell or lease, as the public welfare may demand. Such property may be converted into money or other things, and in that form devoted to the use of the public. But property devoted to a public use cannot be sold or leased without special statutory authority. It follows that the writing purporting to grant to John R. Bothwell the right of Ogden City to furnish water to it and its inhabitants, and to lease to him its water rights, as long as he or his assigns should furnish water to it, and the resolution of its city counsel purporting to turn over to the Bear Lake & River Waterworks Company the waterworks system of the city, were absolutely void, because made without authority of law."

A third case is *Lake County, Etc., Co. v. Walsh,* 65 N. E. 530. We need only to quote from the opinion, page 532:

"The statutes bearing upon the question of the power of cities incorporated under the general laws of this state to sell property held by them are the following: Section 3548 declares that any city owning real estate shall have power to sell and convey the same as the common council may deem expedient. Section 3549 provides that such sale must be authorized by a vote of two-thirds of the members of the common council. Section 3550 requires that the real estate to be sold shall first be appraised by three disinterested freeholders of such city, to be appointed by the judge of the Circuit Court of the county in which such city is situated. Section 3541, clause 45, authorizes the city to purchase, hold, or convey real estate for the purpose of constructing public buildings thereon, or using the same for a public park, or other public purpose. Section 3541, clause 47, provides that the common council may, upon the

petition of a majority of the legal voters of the city, sell any public square or public landing of such city, or part thereof, and convey the same by deed; the moneys arising from such sale to be deposited in the city treasury to be expended in the purchase of any other public square, or public landing, and for the improvement of the same. Section 3550a (Acts 1895, p. 151) gives to the common council of certain small cities the power, by a vote of a majority of its members, to sell and convey to any corporation or body politic, any public square, market square, market place, fractional piece of ground, or public park owned or held by such city, or within its corporate limits, to be held by such corporation or body politic, and devoted to any public purposes. Sections 3548-3550, 3541, cls. 45, 46, 3550a, Burn's Rev. St. 1901 (sections 3111-3113, 3106, cls. 45, 47, Rev. St. 1881; sections 3111-3113, 3106, cls. 45, 47, Horner's Rev. St. 1901). The first three of the sections above referred to evidently relate to real estate held by the city for private purposes only. None of the other enactments purports to authorize the sale of any property held for public use, except such as is expressly mentioned in their provisions. *These statutes clearly indicate that the power of a city to sell property devoted to any public use is restricted, and that, to enable a city to make a sale of such property, special authority must be granted it by the legislature.* Property so held is held upon a trust for the benefit of the inhabitants of the city; and the city, as the trustee for such use, cannot, by its unauthorized act, destroy the trust."

The three cases which we have now presented cite a great many authorities—both opinions of courts and texts of leading legal writers—in support of these principles.

All three courts held that the general power to sell and convey property, as granted to the city in each instance, was exercisable only for the disposition of property which was not affected with a public use and that any sale or conveyance of property under public use could be made only under express and direct authorization by the legislature—an authorization which would have to state directly that property then in public use and accurately described in the legislative enactment could be disposed of in a specified manner.

In the last published volume of the American Law Reports, Volume 39, at page 206, there is reported an Oklahoma case, which fully supports our position on this question. It is *City National Bank v. Kiowa.* A few quotations from the opinion will suffice.

> (a) "Therefore, since Section 6, art. 18, Const. is a grant of power to municipalities in furtherance of public policy, and since the impairment or destruction of public service, or the diversion of public funds to purposes other than those for which they are voted, are clearly obnoxious to the public policy of the state, authority of the incorporated town of Kiowa to sell its water and light plant must be found, if it exists, in the language of some express statute."
>
> (b) "It is only when the public use has been abandoned, or the property has become unsuitable or inadequate for the purpose to which it was dedicated, that a power of disposition is recognized, in the corporation."
>
> (c) "It would open a door for the exploitation of the public through collusive sales of municipally owned public utilities. Not that this result would follow in any particular case, but that it might do so is sufficient reason for the public policy which forbids it."

(d) "It is therefore concluded that no express or implied power has been vested in municipal authorities in this state to sell or otherwise dispose of a municipal water and light plant, acquired under Section 27, art. 10, Const., unless the same has been abandoned as a public utility, or has become inadequate and is not adapted to the public uses for which it was originally intended."

(e) "Public policy forbids that a public utility such as this shall be impaired or destroyed wilfully, or that private rights shall be acquired therein, the enforcement of which will have this result."

There is a very full note in connection with this case and in the very first paragraph of this note the author of it summarizes the law of the United States in these words:

"In this country, however, it is generally held that a municipal corporation has no implied power to sell property which is devoted to a public use; such property, even if the title is in the municipality, is held in trust for the people of the state as a whole, *and cannot be alienated except by the express consent of the legislature or upon the discontinuance of the public use in the manner provided by law.*"

Later in this brief we will quote a number of California statutes which, in general terms, authorize disposition of property not needed for public purposes. *But at this place we want to note the essential distinction between an authorization to sell property no longer needed for public use and an authorization to sell property which is still needed for such use. For the former only a general legislative enactment is re-*

quired—a grant of power in advance to sell unneeded property at any time. But for the latter, according to the cases, a special legislative act is necessary whereby, in terms, a disposition of particular property in public use is permitted.

We have not discovered, after careful search, any California case which treats as squarely of the problem as the three cases we have noted. Yet our reports are not without cases which make it plain that these same principles are law with us.

Hoadley v. San Francisco, 50 Cal. 265 at 275 and 276:

> "The legal title to the squares, as already stated, vested in the city by the operation of the act of Congress of July 1, 1864. Admitting it to be true, that ordinarily the statute of five years is applicable in respect to lands to which the city holds the title, as was decided in this court in *Calderwood v. San Francisco* (31 Cal. 588), is that statute applicable in this case? Was the legal title which the city held extinguished by the adverse possession of the plaintiff for a period of five years after the passage of the act of Congress of July 1, 1864? The title which the United States held in the land, and which was transferred to the city by the act of Congress, was so transferred to the city in trust, for the purposes expressed in the statute of March 11, 1858, above referred to, and for no other purpose. That is to say, the title was granted to the city in trust, for public use; and the city had no authority, by virtue either of the statute of March 11, 1858, or of the act of Congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to pri-

vate persons, and is effectually withdrawn from commerce; and the city having no authority to convey title, private persons are virtually precluded from acquiring it. The land itself, and not the use only, was dedicated to the public. Land held for that purpose, whether held by the state or a municipality, in our opinion, is not subject to the operation of the Statute of Limitations."

County of Yolo v. Barney, 79 Cal., 375 at 380.

"The question then recurs, Did the board of supervisors, acting for the county, apply this land to a public use? Hospital buildings are public buildings. (Pol. Code, Sec. 4046, Sub. 9.) If a public building be erected upon land belonging to the county by the proper authorities and it be devoted to the uses necessary to the character of the building and the purpose for which it was erected, it would seem as if the land was dedicated or put to a public use. Court houses, jails, and hospitals are put upon the same footing by the statute, supra, are called 'public buildings' and they are such to all intents and purposes. It will not do to say that the land on which they stand, or which is appurtenant and necessary thereto, is not dedicated to a public use. To hold otherwise would be to leave county jails, hospitals, court houses, and other public buildings, and the ground on which they stand, at the mercy of careless or corrupt county officials, and rapacious trespassers in collusion, perhaps, with such officers. This is contrary to public policy."

San Francisco v. Straut, 84 Cal., 124;

Ames v. City of San Diego, 101 Cal., 390.

Under leading California statutes we find the legislature putting this principle into statutory form.

Reclamation District Law.

Political Code, Section 3454, Subdivision 10, authorizes the trustees of a reclamation district:

> "To sell, convey, transfer, lease to others or otherwise dispose of such real or personal property belonging to the said district which said board of trustees *shall find no longer necessary* for the construction, maintenance or operation of the works of reclamation of said district."

Irrigation District Law.

The California Irrigation District Act provides in Section 29, Statutes 1919, page 1075:

> "The board of directors may determine by resolution duly entered upon their minutes that any property, real or personal, held by such irrigation district *is no longer necessary* to be retained for the uses and purposes thereof, and may thereafter sell such property."

Sacramento and San Joaquin Drainage District Law.

This act was passed in 1911 (Statutes of 1911, Extra Session, page 117). It has been amended from time to time in different particulars. The original act, in Sections 4 and 12, provided for the acquisition of property, but it nowhere provided for sale or transfer. So in 1921 the legislature enacted a special statute (Statutes of 1921, page 1493) which reads:

> "In case it should be determined by the reclamation board that any land heretofore or hereafter acquired by the Sacramento and San Joaquin drainage district and deeded to the State of California, for any right of way for river improvement work or flood control, *is in excess of what is or will be required therefor,* the board of control upon request of the said reclamation board is hereby authorized to negotiate the sale thereof

at a purchase price determined upon by said reclamation board, and the chairman of said board of control is hereby empowered when so authorized by said reclamation board to execute and deliver in the name and on behalf of the State of California, a conveyance of such land to the purchaser upon payment of such purchase price to the state treasurer."

The reclamation board is the governing body of the district.

County Government Law.

The general powers of the boards of supervisors of our counties are found in Section 4041 of our Political Code. Subdivision 9 of that section enumerates, among other powers, the following:

"To sell at public auction, at the court house door or at such other place within the county as the board may, by four-fifths vote, order, after five days' notice, given either by publication in a newspaper published in the county or by posting in three public places in the county, and convey to the highest bidder for cash any property belonging to the county *not required for public use,* paying the proceeds into the county treasury for the use of the county."

(b) The Entire Dam, Reservoir, Diversion Works and Conduit of the District's Mokelumne River Project Are Necessary for the Purposes and Uses of the District.

This must be true from the very fact that the district is acquiring them. And otherwise the district would not be authorized to acquire them.

(c) Mokelumne River Project of the Defendant District, as Proposed by Its Engineer, Adopted by Its Board of Directors, Approved by Its Voters, and Included in the Atkinson Contract, is Incapable of Use unless the Entire Dam and a Portion of the Reservoir and a Part of the Diversion Works Are Located Upon Lands of the United States Within the Jurisdiction of the Federal Power Commission.

We have so alleged and it is therefore admitted by the motion to dismiss. (See Trans. page 36, par. IX.)

(d) A License From the Federal Power Commission to the Defendant District Will Constitute a Contract Between Them.

There have been few decisions upon the Federal Water Power Act. But one decision has held that the license is a contract between the United States and the licensee.

Alameda Power Co. v. Gulf Power Co., 283 Fed. 606, at 615.

The language of the Court, referring to Section 6 of the act, is:

> "Thus the matter of license to construct the dam becomes in its nature the contract between the licensee and the government for making the improvement and when accepted the licensee is bound to comply with its conditions or submit to forfeiture of license."

This conclusion is inescapable under Section 6, which reads as follows:

> "Section 6. That licenses under this act shall be issued for a period not exceeding fifty years. Each such license shall be conditioned *upon acceptance by the licensee of all the terms and conditions of this act and such further conditions, if any, as the commission shall prescribe in conformity with this act,* which said terms and conditions and the acceptance thereof shall be expressed in

said license. Licenses may be revoked only for the reasons and in the manner prescribed under the provisions of this act, and may be altered or surrendered *only upon mutual agreement between the licensee and the commission* after ninety days' public notice."

(e) The Terms of Any License From the Federal Power Commission to the Defendant District Will and Must Provide for a Sale and Other Disposition, and for a Forfeiture and Loss of Property and Funds of the District Which Are Necessary for its Purposes and Uses.

Even a very hasty reading of certain sections of the Federal Water Power Act will confirm this proposition. We quote the pertinent sections:

Section 3. " 'Project' means complete unit of improvement or development, *consisting of a power house, all water conduits, all dams and appurtenant works and structures* (including navigation structures) which are a part of said unit, and *all storage, diverting, or forebay reservoirs* directly connected therewith, the *primary line or lines transmitting power therefrom to the point of junction with the distribution system* or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and *all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit.*"

Section 13. "In case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or, as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, have been begun but

not completed within the time prescribed in the license, or as extended by the commission, then the Attorney General, upon the request of the commission, *shall institute proceedings in equity in the District Court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed,* and such other equitable relief as the case may demand, as provided for in Section 26 hereof."

Section 14. *"That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in Section 3 hereof, and covered in whole or in part by the license,* or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission."

Section 15. "That if the United States does not, at the expiration of the original license, exercise its right to take over, maintain, and operate any project or projects of the licensee, as provided in Section 14 hereof, *the commission is authorized to issue a new license to the original licensee upon*

such terms and conditions as may be authorized or required under the then existing laws and regulations, or to issue a new license under said terms and conditions to a new licensee, which license may cover any project or projects covered by the original license, and shall be issued on the condition that the new licensee shall, before taking possession of such project or projects, pay such amount, and assume such contracts as the United States is required to do, in the manner specified in Section 14 hereof."

Section 16. "That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may be made thereto by the United States and which are valuable and serviceable to the licensee."

Section 26. "That the Attorney General may, on request of the commission or of the Secretary of War, *institute proceedings in equity in the Dis-*

trict Court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this act or of any lawful regulation or order promulgated hereunder. * * * *In the event a decree revoking a license is entered, the Court is empowered to sell the whole or any part of the project or projects under license, to wind up the business of such licensee conducted in connection with such project or projects, to distribute the proceeds to the parties entitled to the same,* and to make and enforce such further orders and decrees as equity and justice may require. *At such sale or sales the vendee shall take the rights and privileges belonging to the licensee* and shall perform the duties of such licensee and assume all outstanding obligations and liabilities of the licensee which the court may deem equitable in the premises; and at such sale or sales the United States may become a purchaser, but it shall not be required to pay a greater amount than it would be required to pay under the provisions of Section 14 hereof at the termination of the license."

A summary of the main points in these parts of the statutes is as follows:

(a) The "project" or "project works" would at least include the dam, the reservoir, including lands (nearly 1800 acres) to be acquired from private landowners, the power house and some portion of the power-transmission line; and may be part of the water-conduit, too, if that could be disconnected and utilized to produce power; and also all water rights.

(b) The license, *in any event,* terminates at the end of fifty years.

(c) The license may be lost (or forfeited) at any time for a number of different causes.

(d) When, *for any cause or in any way,* the license ends the Federal Government may take the "project" for its own use or it may grant the project to another licensee or the project may be sold at public sale to someone who then will become the licensee, though in any event the district would be compensated in some fashion and in some amount; or another license may issue to the licensee.

(e) The Federal Government may take possession and use the "project" for war purposes, though proper compensation must be rendered.

(f) The Construction of the Dam and Diversion Works on Lands of the United States, Even Though Not Done Under Any License From the Federal Power Commission, Will Entail a Disposition, Forfeiture and Loss of Property and Funds of the District Which Are Necessary for Its Purposes and Uses.

The dam and power house will be constructed wholly upon property of the United States. The immediate diversion works will also be built upon that same property. If the structures which the district proposes to build are not built under contract with the United States plainly the district will be a trespasser. And authorities are not needed here to prove that the owner of land becomes the exclusive owner of all structures of this kind which a trespasser builds thereon—especially where the owner is a government.

(g) What the District Proposes to Do, by and Through Its Contract With Atkinson and Under Its License From the Federal Power Commission, Will Be a Violation of Its Organic Act in Disbursing the Funds of the District and Also Will be a Waste of the District's Funds.

This conclusion follows from what has preceded, by the course of irresistible logic. For if the district, by the terms of its organic act, cannot lawfully dispose of property which is necessary for its purpose as defined by that act, and if, by license—contract or otherwise, such property in the very creation of it (so to speak) will be unlawfully disposed of, then the use of the funds of the district to build such property must necessarily be a violation of the statute and a waste of the district's funds.

(h) Any License From the Federal Power Commission to the District Will Be Invalid Because of the Inability of the Commission to Issue a License Upon the Only Terms Which the District May Lawfully Accept and Because of the Inability of the District to Take a License Upon the Only Terms Which the Commission May Lawfully Grant.

If, so far, our reasoning has been without material flaw this proposition is likewise an irresistible conclusion.

But if we are correct in this final proposition, then several important questions arise:

(a) If the district, through its defendant officials and contrary to the authority of its organic act and contrary to the law of California, does take a permit or license from the Federal Power Commission under such terms and conditions, will that permit or license be void or valid under the Federal Water Power Act?

(b) If the permit or license is void and the district constructs its project what will be the legal status of the dam and reservoir—who will own them, the United States or the District?

(c) Or, under such circumstances, will the license be partly valid and partly void—say valid so far as it will give the district the right to occupy the Federal land but void so far as it will subject the dam, reservoir, tunnel and possibly part of the aqueduct to loss by the district in the several ways specified in the Federal Water Power Act?

(d) If, because the permit or license is void, the United States will technically become the owner of the dam, reservoir, tunnel and part of the aqueduct, yet may it be that in some way the United States will be charged with a trust thereon on behalf of the district or on behalf of the State of California through its creature the district?

(e) If, under such circumstances, the permit or license is void but the Federal officials (the Federal Power Commission) let the district into occupation and the district builds its project will some other sort of license arise between the United States and the district? And will such other license be revocable or irrevocable and what otherwise will be its terms and what will be the ownership of dam, reservoir, tunnel and aqueduct?

(f) If the permit or license is void but the district constructs the project, will any ownership or interest of the United States extend to any portion of the project outside the land owned by the United States?

(g) If the permit or license is void but the district takes it and constructs the project, will the district, its officials and taxpayers become estopped to deny the validity of such permit or license?

(h) If the permit or license is void but the United States issues it and allows the district to enter under it and to construct and operate the project will the United States be estopped to deny the validity of such permit or license?

Upon the answers to these questions will depend any decision that the district will or will not violate its organic act in constructing this project.

But also, as we shall later show, *these very questions demonstrate that the matter in controversy does arise under the laws of the United States.*

In the lower Court the defendants did not gainsay that the law in California is as we have tried to expound it through so many previous pages. Rather they attempted to evade its application to this case by a number of arguments.

First, they said, this law applies to acts which would be in violation of and a repudiation of a public trust, but the contract with the Federal Government will be in aid of and consistent with the public responsibilities of the officers of the district, in aid of the general enterprise. This is a plausible but a bad argument. It is an attempt to cloak evil with a show of good. It is putting sheep's clothing upon a wolf. For doubtless in every case where the Courts declared the attempted sale of public property void because the property was impressed with a public trust the public

authorities justified and defended their act by claiming it to be to the financial welfare and advantage of the city. Perhaps, too, as strict matter of business, they were right. But the Courts did not let that fact interfere with or direct the decision. The fact that a city can operate a municipal waterworks only at a heavy loss does not authorize its trustees to repudiate the public trust by a sale of the works into private operation; for *the point is that the property is impressed with a public trust, that the property is in active service of the public, that the public relies upon the continuance of that service, that the public welfare demands the continuance of that service, that such interests and necessities of the public shall not be subjected to injury through any removal of the property from such public service and trust; and that such public service and trust must continue in connection with the property until something else has been provided which will take its place and make it useless.* When we apply this clear principle to our case it is but begging the question to say that what this district proposes to do is in aid of and not in repudiation of the public trust. For what do the directors of the district propose to do? Why, they propose to create a property to serve the public of the district with water and thereby to create a property which will be impressed with a public trust, while, on the other hand, they propose to subject that property by contract to possible dispositions hostile to the continuance of that property in the service of the public of the district and in the fulfillment of the public trust. *Thereby the proposed contract, on the principle which we invoke,*

is not in aid of the enterprise as a permanent trust-impressed project for the benefit of the people of the district but is hostile to such enterprise. Let us compare this proposed contract with the Federal Government with a proposed lease; for they are very similar. We do not doubt that the district may take a lease of property. To lease property is simply to acquire the right to use it. But a grant of power to lease property from another does not necessarily include with it the further power to take a lease which contains a provision that the lessee shall construct a large building on the property and that on a forfeiture or other termination of the lease the building shall revert to the landlord. A grant of power *to a private business corporation* to lease property might very well be held to be broad enough to include the power to lease on such terms, and yet a grant of power to a *public or municipal corporation* to lease the same property might very well be held to be *not* broad enough to include the power to lease on such terms. *The difference is that a public question enters into one situation but not into the other.* Two examples will illustrate the difference; as:

(a) A lease by a private corporation of a block of land for a period of fifty (50) years under an agreement to erect a large office building thereon which shall be the property of the landlord at the end of the term.

(b) A lease by a city of the same block of land for a period of fifty years under an agreement to erect a city hall and other public buildings thereon which

shall be the property of the landlord at the end of the term—say, for example, the present City Hall of San Francisco or the present City Hall of Oakland; for if legal at all it would be as legal for such structures as for any others. *In their respective fields* the City Hall of Oakland is related to the City of Oakland, and the dam, reservoir, et cetera, at Lancha Plana are related to the cities within the district in exactly the same way.

The public question which makes the distinction is fully stated in the various authorities from which we have quoted lengthily in preceding pages. It is put in these words in the note to the recent Oklahoma case (39 A. L. R. 217):

> "In this country, however, it is generally held that a municipal corporation has no implied power to sell property *which is devoted to public use;* and such property, even if the title is in the municipality, *is held in trust for the people of the state as a whole,* and cannot be alienated except by the express consent of the legislature or upon the discontinuance of the public use in the manner provided by law."

And the Oklahoma Supreme Court, at page 212 (39 A. L. R.) puts the difference neatly in this way:

> "There is a clear distinction, recognized by practically all authorities, between property purchased and held by municipal corporations for the use of the corporation as an entity, *and that purchased and held by such corporation for the public use and benefit of its citizens.* In other words, its title to and power of disposition of property acquired for strictly corporate uses and purposes *are different from its title to and power of disposition of property acquired for and actually*

dedicated to the public use of its inhabitants. As to the former class the power of the corporation to dispose of it is unquestioned. The rule is different as to the latter class. *It is only when the public use has been abandoned, or the property has become unsuitable or inadequate for the purpose to which it was dedicated, that a power of disposition is recognized in the corporation."*

There are many other authorities on the question of the power of a municipal corporation to dispose of properties which are charged with a public use. A few important ones are:

Wright v. Walcott, (Mass.) 18 A. L. R. 1242;

Davis v. Rockport, (Mass.) 43 L. R. A. (M. S.) 1139;

Douglass v. Montgomery, (Ala.) 43 L. R. A. 376.

Note: This case further supports plaintiff's right to bring this suit to enforce the right of the district against misapplication of its funds and property.

Augusta v. Burum, (Ga.) 26 L. R. A. 340.

Nor must we forget another thing—namely, that under the Federal Water Power Act the "project", *which by the terms of the act and the license under it are subject to the authority of the Federal Government,* includes some 1800 acres of lands *which the district must acquire from private landowners* and also such transmission lines and aqueducts *beyond the government's land* as will be necessary to enable the Federal Government to operate the "project" in case the government shall take it over in any way provided by the act and license. *The necessary effect*

of the act and license is that these structures and lands, like the structures built directly upon the Federal lands, become the property of the United States and all that the district will have will be a possible contractual right to use the structures and lands for a limited period and to be paid for them when that use ceases. The district cannot sell these reservoir lands, transmission lines and aqueducts; neither can it contract them away by taking a license under the Federal Water Power Act.

Second, the defendants said to the Court below that, the Federal Government could not take the dam and reservoir without compensation. But what of it? The fact that the city authorities proposed to get full value on a sale of property impressed with a public trust has never prevented an application of the principle that such property could not be sold under a general power of sale. And the full value of the property, though paid into the city's coffers, does not provide the public with the service of which it has been deprived through the sale of the trust-burdened property.

Third, the defendants said that the government must give reasonable notice of an intention to take over the property; the district, if it observes the license, will be entitled to have the enjoyment of the property for fifty years, and probably the Federal Government will never take the project away from the district. These are matters of speculation and, as such, interesting. But we are dealing with a firm principle which has so been made firm out of an abundance of reason and from an abundance of ex-

perience. The principle is not to be whittled to nothing, or nearly so, by such process of shaving it "by degrees", by trying to ascertain whether or not the evil possibilities are near or remote, in the judgment of the Court. The structures will be built upon Federal land. They will become part of the land—as much so as the natural-rock foundation. The title to them will then be in the owner of the land. The United States continues as such owner. All that the district will have will be a possible contractual right to use the structures for a limited period and to be paid for them when that use ceases. *Moreover, by the very terms of the Federal Water Power Act and the license under it the "project" which comes under such control of the Federal Government includes the entire reservoir—some 1800 acres of land which must be acquired by the district—and other structures, such as necessary transmission lines, which will not be upon the government property. The effect of the license is immediate—that the title to all these lands and structures goes to the Federal Government at once to feed the terms of the license and the Federal Water Power Act.* Neither the Courts nor the district can control the future, for the future will be in the hands of the United States Government; and the exigencies which may arise cannot be guessed, much less foretold. The fact remains that title to millions of dollars of property, created and acquired by the district, passes at once by the license to the Federal Government, that such property in its creation and acquirement is impressed with a public trust for a public service to the people in the district, and that under the law such

disposition of the property may not be made, even though a long term of use is reserved.

Otherwise what could not be done directly could be done indirectly—by transferring title for a valuable consideration with a reservation of a long term of use on conditions and by forfeiting thereafter the right to such use by not observing the conditions. Surely the Courts will not weaken the principle by sanctioning such an arrangement or by making it possible. And, finally, such a deal with a private concern would be fully as justifiable as it would be with the Federal Government. *The applicability of the principle cannot turn on the character of the party with whom the deal is made.*

Fourth, the defendants further said: "Other public agencies have similar rights from the Federal Government. Witness the licenses of the City and County of San Francisco for its Hetch Hetchy Project and the City of Los Angeles for its Owens River Development. The conditions of forfeiture contained in these grants have not prevented the development of a necessary water supply for these communities." The charters of Los Angeles and of San Francisco are not before this Court for construction. But if we are right in the law then the fact that a decision according to law will affect Los Angeles and San Francisco is not of any consequence here. If those two cities have violated their charters they must take the consequences. We take it that the Courts will not render wrong decisions merely to support what Los Angeles and San Francisco have done, especially where the Courts are asked *to assume* in arriving at their decisions

that Los Angeles and San Francisco have violated their charters in the respect under challenge. Otherwise what chance has the ordinary citizen to confine such public agencies within the limits of their fundamental authority?

Fifth, the defendants also said: "The public service corporations distributing the power are liable to forfeit their licenses for a disregard of the terms thereof. It has been held that even private public service corporations cannot dispose of their property in such a way as to impair the performance of their public trust;" And yet, said defendants, it is clear that such public service corporations can legally take such licenses from the Federal Power Commission. *In the first place* we challenge this conclusion. Let us assume two states of fact—(a) a public service corporation which serves a community with a supply of water to the exclusion of all other supplies and which proposes to take a license whereby under several different contingencies and finally at the end of a definite period of years that water system may be taken away from the company by the Federal Government and devoted to the use of some other community. (b) A public service corporation which, serving a community with a supply of water to the exclusion of all other supplies, proposes to abandon and destroy that supply and to take such license from the Federal Government. We do not hesitate to contend, under the very principle advanced by the defendants, that such public service corporation would not be allowed to enter into such an arrangement—because "even private public service corporations cannot dispose of

their property in such a way as to impair the performance of their public trust." *In the second place* we are dealing in our case with an *actual want of statutory authority in the district to dispose of its property*—whereas private public service corporations, since they are organized with broad powers, always have as full power to dispose of property as they have to acquire it. In other words, we have in our case two reasons why the district may not take this license:

(1) It lacks the statutory power to dispose of its property under the terms of the license; and

(2) Such disposition violates the public trust for which it proposes to acquire the reservoir site, build the dam, etc. The cases which deal with private public service corporations consider only the second reason and there is much more room for discretion in action under the second than under the first reason.

VIII.

SECOND QUESTION.

IS THE COMPLAINANT A PROPER PARTY IN INTEREST?

Any discussion of this question begins with these propositions of law and fact:

(a) The directors of the district, in constructing this project, will waste the funds and property of the district. (Provided that our exposition of the law on the first question has been correct.)

(b) Complainant is a taxpayer within and to the district (Trans. page 31, Par. II and page 33, Par. VI) and is necessarily interested in a financial way

to see that the funds and property of the district are not wasted.

(c) The directors of the district have let a contract to Lynn S. Atkinson, for the contract price of $3,081,378, to build the Lancha Plana Dam, and outlets through the dam, including gates and power house (Trans. page 42) entirely, and necessarily, upon lands of the United States. (Trans. page 36, Par. IX.)

(d) If the directors, acting on behalf of the district, are permitted to take a license from the Federal Power Commission and to proceed with the project they will do so and will have Atkinson go ahead with his contract and will pay him as the contract requires. (Trans. page 49, Par. XXIV.) (See also pages 34, 46 and 47.)

(e) The district is in control of its directors; demand upon them that they decline to proceed with the project is useless; and therefore tax-payers alone, by proceedings in Court, can stop the threatened waste of the district's funds and properties.

That tax-payers may do so is amply settled. Their right to do so and the circumstances under which they may act are expounded by the following authorities:

The best short statement of the California law that we have seen is this from *Crowe v. Boyle,* 184 Cal. 117 at 152:

> "In this state we have been very liberal in the application of a rule permitting taxpayers to bring a suit to prevent the illegal conduct of city

officials, *and no showing of special damage to the particular taxpayer has been held necessary.*"

In *Santa Rosa Lighting Co. v. Woodward,* 119 Cal. 30, at 34, the Court said:

> "Besides, as a taxpayer plaintiff was beneficially interested, *and I do not think it essential, upon an application in a proper case designed to compel compliance with statute law, that the party must show actual pecuniary damage.* It should be presumed that where the law enjoins a duty upon a municipal body and specifically points out the mode of its performance, that a violation of that duty and a disregard of the mode of its performance will work injury."

In an earlier case (*Barry v. Goad,* 89 Cal. 215, at 223) the same rule occurs:

> "The objection that the plaintiff cannot maintain the action *for the reason that he does not show that he will sustain any special injury different from that of the public at large is untenable.*"

Moreover, the rule has been applied in California where no direct or special damage could possibly be shown. The following three cases are of that sort:

Yarnell v. City of Los Angeles, 87 Cal. 603.

A taxpayer brought this action against the defendants to prevent the city treasurer from depositing the public moneys of the city with a local bank pursuant to a contract between the city and the bank. We quote from page 610:

> "The point is hinted at, though not pressed in the briefs, that a taxpayer cannot maintain this action. We suppose that counsel wish the case decided on its merits, and not upon an issue

> in the nature of one raised by a dilatory plea; for their arguments go almost entirely to the point of the constitutionality and validity of the part of the charter assailed. We think, however, that in this case where it is proposed to take all the public moneys of the municipality out of the hands of their legal custodian, and place them in the possession and control of a private corporation, a taxpayer has sufficient interest in the subject matter to prevent, by suit, the consummation of the illegal act."
>
> *Clouse v. City of San Diego,* 159 Cal. 434.

The defendant city had sold bonds to get funds to build certain roads. The board of city trustees adopted an ordinance which authorized the board of public works to purchase materials and do the work by the day. The action was brought by plaintiffs as taxpayers to restrain the city's officials from proceeding in this manner or in any other manner than by letting contracts after advertisements for bids. The defendants claimed that their demurrer to the complaint should have been sustained "because of failure to disclose plaintiffs' right of action, *in that the sort of injury which plaintiffs, as citizens, would suffer, is not therein described".* But our Supreme Court replied:

> "We think it is sufficient answer to this contention that a method of paying for work in a manner not prescribed by law might be expensive and wasteful, and that contractors capable of giving the best service might be precluded from participating in the effort to secure contracts to do the work. This would give plaintiffs, as citizens, sufficient standing to maintain this action."
>
> *Gibson v. Board of Supervisors,* 80 Cal. 359.

One quotation from page 366 is enough:

"Counsel for appellant states—although he does not argue—the point that plaintiff in his capacity of taxpayer has no right to institute the action.

It is clearly the law that if the action of the board had been the other way, that is, if they had declared the proposition to issue the bonds carried when in fact it had not been, plaintiff could have maintained the action. *(Schumacker v. Toberman,* 56 Cal. 508; *Andrews v. Pratt,* 44 Cal. 309; *Maxwell v. Supervisors,* 53 Cal. 389; *Foster v. Coleman,* 10 Cal. 278.) That is, a taxpayer can, beyond doubt, restrain any illegal action which would increase the burden of taxation. It is not so clear, however, when he can compel affirmative action, although it was held in *Hyatt v. Allen,* 54 Cal. 353, that he can by mandamus compel an assessor to assess property subject to assessment. It is not necessary here to determine whether or not plaintiff would be entitled to maintain mandamus against the board of supervisors to compel them to issue the bonds. We think, however, that, as a property owner and taxpayer, he is sufficiently a party interested to prevent an untrue, public, official declaration of the result of an election on a proposition to issue bonds and to have the true declaration made, whether the real result of the election be for or against the issuance of such bonds. *No other proper party plaintiff to such an action has been suggested."*

Short quotations from two other cases are apropos:

Winn v. Shaw, 87 Cal. 631 at 636.

"We are of opinion that a taxpayer of a county has such an interest in the proper application of funds belonging to the county that he may maintain an action to prevent their withdrawal from the treasury in payment or satisfaction of demands which have no validity against the county."

Biggart v. Lewis, 183 Cal. 660 at 664.

"It is conceded at the outset, as indeed it must be, that the plaintiff, as a taxpayer of and resident within the district, has the legal right to invoke the remedy of injunction to restrain the expenditure of the funds of the district if it can be said that such expenditure finds no sanction in the law."

What, now, is the principle at the bottom of these cases? It is this—that the city or the county is in the control and under the domination of its officers, that where in the exercise of such control and domination the officers are pursuing illegal methods or are making unlawful expenditures such officers naturally will not afford protection against themselves, *that, in consequence, the only one who can assert the right of the city or county to be protected against the wrongful acts of its officers is some one of the general body of citizens, and that, to insure against mere intermeddling, that someone will be required to be a taxpayer.*

IX.

THIRD QUESTION.

DOES THE MATTER IN CONTROVERSY EXCEED THE SUM OF $3000?

Naturally the answer to this question depends upon what the matter in controversy is.

The district's contention is that the taxpayer sued, in these cases, to protect only his own individual interest and that the measure of that interest is the amount of taxes which the taxpayer probably will

have to contribute towards full payment for that part of the project which will be wasted. In other words, this contention is that the taxpayer sued *on his own behalf to protect his own interest and right* and not otherwise.

If the district's contention is sound, then we readily confess that the amount in controversy does not exceed $3000.

But appellant contends, to the contrary, that the taxpayer since he has a pecuniary interest, is allowed to bring suit because the legally constituted protectors of the district, its directors and officials, as the persons in control of its affairs, are refusing to protect it and, in fact, are actively promoting the wastage of its funds and properties; and *that, in consequence, the right which the taxpayer is enforcing is not his own personal right that he shall not be taxed to provide funds for unlawful uses but is the right of the district that its funds shall not be expended in unlawful purposes and shall not be wasted.*

If we are correct in our position, then the amount in controversy is the amount of the district's funds which will be wasted on the Lancha Plana works under the Atkinson contract, namely $3,081,378.

That such is the right which the taxpayer is enforcing appears very clearly, as we see it, from the cases which we have quoted and cited in Division VIII above in showing that appellant is a proper party to bring this suit.

But there are yet stronger authorities that the right which the taxpayer is asserting is the right of the district and not his own mere personal right.

So has it been held in California. The case is *Osburn v. Stone,* 170 Cal. 480. We quote from pages 482 and 483:

> "A general demurrer was sustained to plaintiff's complaint and from the judgment which followed it, dismissing the action, plaintiff appeals. *The complaint charged that the defendants while acting, one as mayor, the other as member of the council, of the City of Santa Cruz, made certain illegal expenditures for and on account of which plaintiff seeks a judgment against them, compelling them to pay into the city treasury for the benefit of the taxpayers and property owners of the city the sum of $37,163.*
>
> So far as the character of this action is concerned, by the great weight of authority a taxpayer may maintain it. The provision of Section 526a of the Code of Civil Procedure, authorizing a taxpayer to maintain an action to restrain an illegal expenditure, does not in letter or in spirit forbid a taxpayer from seeking to recover on behalf of his municipality the same moneys if illegally expended. Tacitly, this right of action has been recognized in this state in *Mock v. Santa Rosa,* 126 Cal. 331, (58 Pac. 826). That the right to prosecute such an action is abundantly supported may be seen by reference to *Cathers v. Moores,* 78 Neb. 17, (14 L. R. A. (N. S.) 302, 113 N. W. 119); *Zuelly v. Casper,* 160 Ind. 455, (63 L. R. A. 133, 67 N. E. 103); *Russell v. Tate,* 52 Ark. 541, (20 Am. St. Rep. 193, 7 L. R. A. 180, 13 S. W. 130); *Independent School Dist. v. Collins,* 15 Idaho 535, (128 Am. St. Rep. 76, 98 Pac. 857); 2 *Smith on Municipal Corporations,* Sec. 1645; 4 *Dillon on Municpal Corporations,* Sec. 1588. The contrary view obtains in Oregon and in West Virgina. (*Brownfield v. Houser,* 30 Or. 534, (49 Pac. 843); *Sears v. James,* 47 Or. 50, 55, (82 Pac. 14); *Bryant v. Logan,* 56 W. Va. 141, (3 Ann. Cas. 1011, 49 S. E. 21).) These courts reason that it would subject the officers of municipalities to

> intolerable and interminable litigation if the right of a taxpayer to prosecute such an action were recognized. *Yet to us it seems quite plain that the necessity to a municipality, whose affairs are in the hands of hostile trustees or councilmen, to recover for illegal expenditures, through the medium of such an action, is quite as great and as imperative as it is in the case of private corporations, and as a stockholder of the latter would have on behalf of his corporation, upon the refusal of its directors to act, the right to maintain such an action, so we think should a taxpayer in the case of a municipality be accorded the same right and power.*"

Please note that the Court put the matter *on the basis of an analogy to an action by a stockholder "on behalf of his corporation"*. And when we turn to the law in California on the latter subject we quickly discover that the Supreme Court holds that in such case the stockholder is enforcing, *not his own right, but right of the corporation.* We refer particularly to *Turner v. Markham,* 155 Cal. 562, at pages 569 and 570:

> "At the threshold of this inquiry, however, it is proper to pause to point out what is the exact nature of the action before us. In its essence, it is an action brought by the corporation itself to recover redress for some legal wrong which the corporation itself has suffered. *To prevent a failure of justice, as where the governing board of directors or trustees of the corporation refuses to prosecute such an action, the law permits a stockholder to begin and maintain it on behalf of the corporation.* But the fact that a stockholder is the nominal plaintiff in such an action, whether he prosecutes it as an individual stockholder or as a representative of a class of disaffected stockholders, does not in any manner, or to the slightest

extent, enlarge the rights and remedies of the action. *This action must still be founded upon some wrong which the corporation, as a corporation, has suffered, and for which, if itself were plaintiff, it could secure legal or equitable redress.* Therefore, if the evidence shall establish that the corporation itself has suffered no wrong, cognizable either at law or in equity, it will matter not how just and how grievous may be the complaint of the individual stockholder, nor how complete may be the proof of his personal loss, damage, or injury. In this action on behalf of the corporation no recovery may be had, and the stockholder will be compelled to proceed by his individual action to obtain a personal recovery. (3 Pomeroy's Equity Jurisprudence, 3d ed., pp. 2123 et seq.; Cook on Stock and Stockholders, sec. 692; Davenport v. Dows, 18 Wall. 626; In re Ambrose etc., L. R. 14, Ch. Div. (Eng.) 390; Langdon v. Fogg, 18 Fed. 5; Stewart v. St. Louis R. R. Co., 41 Fed. 736; Foster v. Seymour, 23 Fed. 65)."

It might be well to note, too, that the same judge wrote the two opinions in *Turner v. Markham* and *Osburn v. Stone.*

Our point is further emphasized in *Osburn v. Stone,* at page 483, where the Court said:

> "The general rule is that the municipality itself, *upon the refusal of its officers to maintain the action,* should be impleaded as a party defendant, but of course it is fundamental that *where a demand would be* unavailing, as is shown to be the case under the present complaint, *a demand upon the municipal authorities so to commence proceedings is unnecessary.*"

But if the taxpayer were enforcing his own right for his own protection rather than the right of the

municipality for its protection such language would be both pointless and witless.

We have found nowhere any finer statement on this subject than what Professor Pomeroy says in Section 1095, Vol. III, Fourth Edition, of his work on Equity Jurisprudence. We will quote what he says; and the italics are his and not ours:

> "While, in general, actions to obtain relief against wrongful dealings with the corporate property by directors and officers must be brought by and in the name of the corporation, yet if in any such case the corporation should refuse to bring a suit the courts have seen that the stockholders would be without any immediate and certain remedy, unless a modification of the general rule were admitted. To that end the following modification of the general rule stated in the last preceding paragraph has been established as firmly and surely as the rule itself. Wherever a cause of action exists primarily in behalf of the corporation against directors, officers and others, for wrongful dealing with corporate property, or wrongful exercise of corporate franchises, so that the remedy should regularly be obtained through a suit by and in the name of the corporation, and the corporation either *actually or virtually refuses* to institute or prosecute such a suit, then, in order to prevent a failure of justice, an action may be brought and maintained by a stockholder or stockholders, either individually or suing on behalf of themselves and all others similarly situated, against the wrong-doing directors, officers and other persons; but it is absolutely indispensable that the corporation itself should be joined as a party—usually as a co-defendant. The *rationale* of this rule should not be misapprehended. The stockholder does not bring such a suit because *his* rights have been *directly* violated, or because the cause of action is *his,* or because *he* is entitled to the relief sought; he is permitted

to sue in this manner *simply in order to set in motion the judicial machinery of the court.* The stockholder, either individually or as the representative of the class, may commence the suit, or may prosecute it to judgment; but in every other respect the action is the ordinary one brought by the corporation, it is maintained directly for the benefit of the corporation, and the final relief, when obtained, belongs to the corporation, and not to the stockholder-plaintiff. The corporation is, therefore, an indispensably *necessary* party, not simply on the general principles of equity pleading in order that it may be bound by the decree, but in order that the relief, when granted, may be awarded to it, as a party to the record by the decree. This view completely answers the objections which are sometimes raised in suits of this class, that the plaintiff has no interest in the subject-matter of the controversy nor in the relief. In fact, the plaintiff has no such direct interest; the defendant corporation alone has any direct interest; the plaintiff is permitted, notwithstanding his want of interest, to maintain the action solely to prevent an otherwise complete failure of justice."

In the lower Court the district cited against us a number of Federal cases. To complete our discussion we will consider them here.

The district relied very strongly upon *Colvin v. Jacksonville,* 158 U. S. 456. We, in reply, relied upon *Brown v. Trousdale,* 138 U. S. 389. The difference between these two cases is just the difference between the case where the complainant is seeking to enforce or protect his own right and the other case where the complainant is seeking to enforce or protect the right of the corporation, either public or private. The Supreme Court of the United States reconciled these

two cases upon the basis of that very distinction. In *Colvin v. Jacksonville* the Court rested its decision upon the prior case of *El Paso Water Company v. El Paso,* 152 U. S. 157. The Court said of that earlier case: *"The case is in point and is decisive";* and quoted from it as the point of decision the following:

> "The bill is filed by the plaintiff to protect *its individual interest and to prevent damage to itself.* It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result *in its damage* to an amount in excess of $5,000."

Moreover the Court, *on this very ground,* specifically distinguished the early case of *Brown v. Trousdale,* 138 U. S. 389, saying:

> "There several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering about twelve hundred, and for and on behalf of all other taxpayers in the county and *for the benefit likewise of said county* filed their bill of complaint against the county authorities and certain funding officers."

Chief Justice Fuller wrote the decision of the Court in both cases. He said of *Brown v. Trousdale* with reference to *Colvin v. Jacksonville* that the former *"is not to the contrary"* of the latter and then quoted his opinion in the former case as follows:

> "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally

injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct right, in respect to a single and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, *that order was but preliminary, and was not the main purpose of the bill,* but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard."

Therefore, *Colvin v. Jacksonville* is not against us and *Brown v. Trousdale* completely substantiates our position.

Defendant's next case *(Wheless v. St. Louis),* 180 U. S. 379, is plainly a case where *the plaintiff sought to enforce or protect his own individual right.* He attempted to restrain the levy of a street assessment upon his lot by the defendant city—a thing very far from a suit to protect the funds or property of the city from a wrongful use by the city's officials who controlled the city and so kept it from protecting itself. Chief Justice Fuller again wrote the Court's opinion. Neither *Colvin v. Jacksonville* nor *Brown v. Trousdale* is noticed. The Court rightly held that in such case the matter in dispute was "the pecuniary consequence to the individual party."

Defendants' third case is *Walter v. Northeastern Railroad Co.,* 147 U. S. 370. This was a suit against county officials of several counties in South Carolina

to enjoin the collection of certain taxes upon the ground that such taxes were unconstitutional and void. Obviously this case is identical with *Wheless v. St. Louis.* It came before *Colvin v. Jacksonville;* and while it is after *Brown v. Trousdale* the latter case is not mentioned.

Defendants' next case is *Risley v. City of Utica,* 168 Fed. 737. But that was just another tax-case—a case where the complainant filed his bill to enjoin the levy of a tax by the defendant city. It did not involve a wrongful disposition of the property of the city, to its injury, by officials who controlled it and thereby prevented it from protecting itself.

Then comes *Cowell v. City Water Supply Co.,* 121 Fed. 53. It seems to us very clear that this case did not involve anything more *than the personal right of the plaintiff.* The Court stated the matter thus (page 54):

> "The complainant brings this suit on behalf of himself and on behalf of all others of the same class who may join in the proceeding, and his prayer is that the organization of the City Water Supply Company, the stock it has issued, and the mortgages it has made, may be declared void; that his undivided interest, which he avers to be 1/325 of the property held by the City Water Supply Company may be declared to be free from all liens and incumbrances except a lien for $51,000, evidenced by an old underlying mortgage made by the Ottumwa Waterworks Company before the mortgage which was foreclosed was executed, or that, in the event that the court should sustain the incorporation of the supply company, and the stock and mortgages it has made, the complainant may recover of the individuals constituting the committee a sum of money equal to 1/325

of $524,000 and 1/325 of $1,509.79, and 1/325 of the income and earnings of the property since it came into the hands of the committee on September 12, 1897.

It will be seen from this brief statement of the averments of the bill that the property of the City Water Supply Company was not worth, and is not claimed to be worth, more than $525,000, and that the complainant's alleged share of it was not of a value exceeding 1/325 of $525,000, or $1,615.38, while the amount of the judgment for money which he sought to recover in case the stock and the mortgages of the supply company were sustained did not exceed $1,650, and the debt he was endeavoring to collect was only $1,000 and interest."

Defendants also rely strongly upon *Scott v. Frazier,* 258 Fed. 669. But that case squarely held that the right which the plaintiffs were trying to protect *was their own right and not the right of the State of North Dakota.* For the Court said at page 671:

> *"They assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds, and an unconstitutional issue of bonds.* That being the nature of the suit, it is claimed that the entire fund is the amount in controversy, and not the right or possible damage of the plaintiffs. This theory presupposes that the state has rights that are protected by the Fourteenth Amendment. *If it has no such rights, plaintiffs have no standing in this court as its representatives and must stand on their own feet.* Has the state, then, any rights under the Fourteenth Amendment? That question must be answered in the negative. The amendment protects only the rights of 'persons'. This term has been enlarged by judicial interpretation so as to cover private corporations. It does not embrace public corporations, much less the state. Its language is:

> 'Nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> It would be a perversion of language to say this language protects the state against acts of the state. It protects persons only, a term which embraces private corporation, but not public corporations or states. *It follows, therefore, that plaintiffs, while they assert rights under the Fourteenth Amendment, cannot assert rights of the state because it has no rights that are protected by that amendment. It necessarily results that plaintiffs in this suit represent only themselves.*"

Since this was true there could be no question of the correctness of the decision.

The defendant argued in the Court below, and may argue here, that what we say applies only to private corporations—that it does not apply to public corporations. This argument is useless in view of the above decisions. This very argument was offered in *Osburn v. Stone,* 170 Cal. 480, a case involving a municipality; and the Court specifically repudiates any such distinction, saying:

> "Yet to us it seems quite plain that the *necessity to a municipality,* whose affairs are in the hands of hostile trustees or councilmen, to recover for illegal expenditures, through the medium of such an action, is quite *as great and as imperative* as it is in the case of private corporations, and as a stockholder of the latter would have on behalf of his corporation, upon the refusal of its directors to act, the right to maintain such an action, *so we think* should a taxpayer in the case of a municipality be accorded the same right and power."

Moreover, in *Brown v. Trousdale,* 138 U. S. 389, where the right to maintain such an action was upheld, the action was brought to assert the right of a *county* in Kentucky. Finally the United States Supreme Court in *Massachusetts v. Mellon,* 262 U. S. 447, specifically drew the same analogy, as was drawn by the California Supreme Court, of a taxpayer in a municipality to a stockholder in a corporation by saying:

> "The reasons which support the extension of the equitable remedy to a single taxpayer in such cases are based upon the peculiar relation of the corporate taxpayer to the corporation, *which is not without some resemblance to that subsisting between the stockholder and a private corporation.*"

Therefore, the matter here in controversy is far in excess of $3000.

Two recent Federal cases squarely decided this question in accordance with our foregoing contentions. The first is a case decided by the Circuit Court of Appeals for the Eighth Circuit. It is *Hutchinson Box Board and Paper Company v. Van Horn,* 299 Fed. 424. On page 425 the Court said:

> "This is an action in equity, brought by L. K. Van Horn, appellee, against the Hutchinson Box Board & Paper Company, hereinafter called the Box Board Company, the Hutchinson Egg Case Filler Company, hereinafter called the Egg Case Company, and Emerson Carey, appellants, to set aside and cancel a contract entered into between the two companies, and to recover the market price of certain straw board furnished the Egg Case Company by the Box Board Company under said contract. *Appellee is a stockholder in the*

Box Board Company and prosecutes this suit as a stockholder's suit after demand upon the Box Board Company and its officers to prosecute the same and their refusal."

And on page 428, the Court also said:

"Appellants first contend the trial court erred in overruling the motions to dismiss, and in not dismissing the suit after it found that the market value of appellee's stock was not equal to $3,000. They predicate their argument upon the proposition that the amount in controversy is to be determined from the actual value of the stock owned by appellee. In this appellants are in error. The controversy involves the validity of the contract, the amount due the Box Board Company for box board and other products furnished thereunder, the duty of the company to prosecute a suit to cancel the contract and for an accounting for the products furnished, and the right of the appellee to prosecute such suit as plaintiff because of the refusal of the company to prosecute same. *The right sought to be enforced belonged to the company, but upon its wrongful refusal to sue therefor the right to prosecute the suit inured to the appellee. The judgment had to be for the amount due the company and not merely the amount of appellee's incidental interest therein.* Davenport v. Dows, 85 U. S. 626, 21 L. Ed. 938. Clearly, then the amount in controversy is the value of the corporate right sought to be enforced and not the value of appellee's stock. Foster's Fed. Prac. (6th Ed.) vol. 1, par. 16; McKee et al. v. Chatauqua Assembly et al. (C. C.) 124 Fed. 808; Larabee v. Dolley, State Bank Commissioner, et al. (C. C.) 175 Fed. 365 (reversed on other grounds 179 Fed. 461, 102 C. C. A. 607, 32 L. R. A. (N. S.) 1065)."

The second case is one decided by the District Court of New York for the Southern Division. It is

M'Atamney v. Commonwealth Hotel Const. Corp., 296 Fed. page 500. At pages 501 and 502, the Court said:

> "It appears that the moving party is a stockholder owning one share of stock in the Commonwealth Hotel Construction Company, one of the defendants herein. He began suit in the New York state court, on or about December 20, 1923, on behalf of himself as a stockholder and all other stockholders who choose to make themselves parties to the action, against the two defendants herein and other individual officers and directors of the Commonwealth Hotel Construction Corporation. *The action, in substance, is for malfeasance or misfaesance in office, and the corporations are joined as defendants apparently because the transfer of certain real estate from one of the defendant corporations to the other is challenged. The action is in the nature of an action for waste and to prevent diversion of corporate assets.*"

Again, on pages 503 and 504, the Court said:

> "The bill of complaint alleges a diversity of citizenship, and the plaintiff asserts a claim of $2,800 incurred by the defendant Commonwealth, and a claim of $2,500 incurred by the defendant Broadway. It further alleges that the assets and properties of the two defendants are commingled, and that only by a trial can it be adjudicated whether any apportionment of said claims, if established, should be apportioned partly to one and partly to the other defendant. In substance, it alleges facts which, if substantiated, would predicate a common liability for the total amount. The intervening creditors, as party plaintiffs, have, or some of them have, claims in excess of $3,000. The moving parties herein contend that these allegations do not show that $3,000 is the subject of the controversy, so that the court may assume jurisdiction. The court is of the opinion, as stated, that the aggregate amount of

plaintiff's claim against the defendants is in excess of $3,000, even if the intervening parties plaintiff were not considered. *But the plaintiff and the others intervening as plaintiffs seek to have all assets of the defendant corporations conserved for the benefit of all persons concerned. The subject matter of the action is not, therefore, merely the debt of the plaintiff, or of the intervening plaintiffs; it is the property of the defendant corporations, sought to be taken possession of and distributed on behalf of the plaintiff and all other creditors and parties in interest.*

The bill of complaint alleges, and it is not disputed, that the property and assets of the defendant corporations, which are the real subject matter of the suit, are worth 'many hundreds of thousands of dollars', and, in my judgment, in any event, these assets are the amount involved for the purpose of determining this jurisdictional question in an action of this nature."

Then there is the decision of the United States Supreme Court entitled *City of Davenport v. David Dows,* 18 Wall. 626, 21 Law. Ed. 938. In that case the Court said:

"That a stockholder may bring a suit when a corporation refuses is settled in *Dodge v. Woolsey,* 18 How. 340, 15 L. Ed. 404, *but such a suit can only be maintained on the ground that the rights of the corporation are involved.* These rights the individual shareholder is allowed to assert in behalf of himself and associates, because the directors of the corporation decline to take the proper steps to assert them. Manifestly the proceedings for this purpose should be so conducted that any decree which shall be made on the merits shall conclude the corporation. This can only be done by making the corporation a party defendant. *The relief asked is on behalf of the corporation, not the individual shareholder;*

and if it be granted the complainant derives only an incidental benefit from it.''

X.

FOURTH QUESTION.

DOES THE MATTER IN CONTROVERSY ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES?

When we enter upon this question we must remember four things in particular:

(a) That Section 14 of the Federal Water Power Act says:

> "The United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects *as defined in Section 3 hereof, and covered in whole or in part by the license.''*

(b) That Section 3 of the act defines "project'' in these all-comprehensive words:

> " 'Project' means complete unit of improvement or development, consisting of a power house, *all water conduits,* all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and *all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system,* all miscellaneous structures used and useful in connection with said unit or any part thereof, *and all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such suit.''*

(c) That only a few hundred out of several thousand acres in the proposed Lancha Plana Reservoir are federal land and the rest are in private ownership and will be acquired by the district by purchase or condemnation.

(d) That to make use of the reservoir, the dam and power house the district will build pipe lines to convey water and transmission lines to transmit power and these water and power lines will be off the federal land but will be necessary for the use of the reservoir, dam and power house.

In the trial Court the defendants argued that the only question here is whether or not what the district proposes to do is in violation of the law of the State of California—a non-Federal question. But such view refuses to recognize a correct sequence and distinction in ideas. The proper sequence and distinction is

(a) The district proposes to acquire 1800 acres of land from private owners, to get from the United States a license to use 200 acres of adjoining Federal land, to construct a dam on the Federal land which will utilize the entire 2000 acres as a single reservoir for a single "project", to build a power-house as part of the dam, and to build transmission lines from the power-house and pipe lines from the reservoir as part of the same "project";

(b) the license, as issued under the Federal Water Power Act, must contain certain provisions; and those provisions involve the 1800 acres and transmission lines and pipe lines as well as the dam and power-house which will be erected on the Federal lands;

(c) by the law of the State of California the district has certain limitations upon its powers;

(d) query—is the effect of the Federal Water Power Act and of the license issued under it and of the future acts of the district in conforming thereto such that the district will exceed those limitations upon its powers? There is no dispute between us over propositions (a) and (b), but we seriously disagree on propositions (c) and (d). Proposition (c) is a question in state law; proposition (d) is a question in Federal law and the matter in controversy under it is a Federal question, as we expect to show. But what we here emphasize is that this case involves several questions, some of which are state questions and some of which are Federal questions; and under such circumstances the Federal Courts have jurisdiction.

Chicago Great Western R. Co. v. Kendall, 266 U. S. 94.

Here the contention of defendants must come to this —that a decision of the state question in plaintiff's favor is necessary in order that a Federal question can arise and that where such is the case, the Federal Courts cannot have jurisdictions. But the error in this conclusion is so plain that we will not waste words on it.

We assume then, that the state question has been decided in our favor. On that assumption what matter in controversy arises under the constitution or laws of the United States?

Here a surprising number of suggestions may be made, and, without attempting to be exhaustive, we offer the following:

(a) Will the effect of the license be to transfer title at once to the United States of the 1800 acres which the district must acquire from private landowners? If so, there will be an immediate wastage of funds of the district; but if not, will there be a wastage of funds?

(b) Or, will the effect of the license be to give to the United States merely a contract for title by which the United States or some other licensee than defendant district will get title when compensation has been paid to the district as required by the Federal Water Power Act? If so, will the effect of such contract really be a wastage of the funds of the district?

(c) Or, in view of the limitations upon the powers of the district and the principle of public policy involved can a license, as a contract between the district and the United States, have any such effect as is suggested in either (a) or (b) supra? And if not, will there be a wastage of funds of the district?

(d) Questions (a), (b) and (c) must be directed also to the power transmission lines and the pipe lines to the extent that they are off Federal lands and yet are reasonably necessary as part of the "project" for its successful operation and enjoyment.

(e) Will the license be valid or void if the district takes such license in excess of its powers? If the license will yet be valid there will be a wastage of funds of the district; but will there be such wastage if the license is void?

(f) May the Federal Power Commission make such modifications in the license that the district may take it and still comply with the California law?

(g) If the license is void but the district enters under it and erects structures on the Federal land—

1. Will the district be estopped to deny the validity of the license?

2. Will the United States be so estopped?

3. Will any estoppel of the district extend to the 1800 acres and to the transmission lines and pipe lines?

4. If the United States is not estopped may it, *at its pleasure,* require the district to surrender possession of the Federal lands and the structures on them without compensating the district for their value?

5. If the United States is not estopped and it does force the district to surrender possession of the Federal lands may the United States use the dam without compensating the district for the 1800 acres?

(h) Will the license be partly valid and partly void—*valid* as far as it gives the district the right to occupy the Federal land but *void* as far as it purports to subject the 1800 acres and transmission and pipe lines to loss by the district in the several ways specified in the Federal Water Power Act?

(i) If the license is void but the district enters under it, erects structures, and completes and operates the project—

1. Will the United States be charged in any way with a trust upon the "project" on behalf of the people of the district or the State of California?

2. Will the law raise any other sort of license between the district and the United States, and if so, what would be the terms of such other license?

(j) If in taking the license upon the only terms admissible under the Federal Water Power Act, the district exceeds its powers but enters under the license, erects structures and completes and operates the project, may the United States still hold the district to the terms of the license and the Federal Water Power Act?

(k) How far must the United States, through its agency, the Federal Power Commission, take notice of and be bound by limitations upon the powers of the district?

Now, as we assume that there are those limitations upon the powers of the district for which we contend, it is obvious that the answers to all these questions will determine—

First—whether or not the taking of such license in excess of its powers will subject the district to any disposition of its funds or properties contrary to its organic act; and

Second—what will be the extent of such unlawful disposition of its funds and properties?

Thus the proper construction and application of the Federal Water Power Act is directly involved. The right asserted by the plaintiff will be sustained on a construction and application of the Federal Water Power Act in one way in the many respects suggested and will be defeated by a construction and application

thereof in another way in the many respects suggested. Our case is then within the holding in *Carson v. Dunham,* 121 U. S. 421 at 427, where the Court said:

> "The suit must be one in which some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States or sustained by a contrary construction."

The district is bound to know and recognize all limitations upon its powers, whether imposed by statute or by general principles of public policy as established by law. The district has applied (as it must apply) to the Federal Power Commission for a license under the Federal Water Power Act to use certain Federal lands. The Courts must presume that such application is made in good faith without any intent to exceed any limits on the district's powers. Therefore the district necessarily contends, in view of the limitations upon its powers which we have found to exist, that the Federal Water Power Act, by proper interpretation and application, will not compel the district to do anything which will exceed such limits on its powers. We, on the other hand, contend that the taking of a license by the district under the Federal Water Power Act will compel the district to do many things beyond its powers and thereby to waste its funds and properties. And thus between these parties there is a square issue or controversy arising under the Federal Water Power Act.

In determining whether or not the Federal Courts have jurisdiction of a case on the ground that the

matter in controversy arises under the constitution or laws of the United States, the United States Supreme Court has declared that the following rules must be applied:

First (quoting from *Little York Gold Washing and Water Company, Limited v. Keyes,* 96 U. S. 199, 24 Law. Ed. 656 at 658):

> "A cause cannot be removed from a State Court simply because, in the progress of the litigation, it may become necessary to give a construction to the Constitution or laws of the United States. *The decision of the case must depend upon that construction. The suit must, in part at least, arise out of a controversy between the parties in regard to the operation and effect of the Constitution or laws upon the facts involved.*"

Second (quoting from *Binderup v. Pathe Exchange,* 263 U. S. 291, 68 Law. Ed. 308 at 314):

> "Jurisdiction is the power to decide a justiciable controversy, and includes questions of law as well as of fact. A complaint setting forth a substantial claim under a Federal statute presents a case within the jurisdiction of the court as a Federal court; *and this jurisdiction cannot be made to stand or fall upon the way the court may chance to decide an issue as to the legal sufficiency of the facts alleged any more than upon the way it may decide as to the legal sufficiency of the facts proven.* Its decision either way, upon either question, is predicated upon the existence of jurisdiction, not upon the absence of it. *Jurisdiction as distinguished from merits, is wanting only where the claim set forth in the complaint is so unsubstantial as to be frivolous; or, in other words, is plainly without color of merit.*"

Third (quoting from *Siler v. Louisville & N. R. Co.,* 213 U. S. 175, 53 Law. Ed. 753):

> "The Federal questions as to the invalidity of the state statute because, as alleged, it was in violation of the Federal Constitution, gave the Circuit Court jurisdiction, and, having properly obtained it, *that court had the right to decide all the questions in the case, even though it decided the Federal questions adversely to the party raising them, or even if it omitted to decide them at all but decided the case on local or state questions only.* This court has the same right and can, if it deem it proper, decide the local questions only, and omit to decide the Federal questions, or decide them adversely to the party claiming their benefit."

Naturally, we have not found an identical case. But there is a case very close to ours. It is *Smith v. Kansas City Title Co.,* 255 U. S. 180. The plaintiff, a stockholder in the defendant, brought the action to restrain the defendant from investing its funds in bonds of Federal Land Banks or Joint Stock Land Banks. The suit was brought in Missouri. Both plaintiff and defendant were citizens of Missouri. The claim was that such investment would waste the funds of the defendant institution because the act of Congress creating the obligors on the bonds was unconstitutional and so the bonds were void. "The bill avers that the defendant Trust Company is authorized to buy, invest in and sell government, state and municipal and other bonds, but it cannot buy, invest in or sell any such bonds, papers, stocks or securities which are not authorized to be issued by a valid law or which are not investment securities, but that nevertheless it is about to invest in Farm Loan Bonds." (Page 198.) In other words, the challenge was that the defendant *proposed to exceed its charter*

powers in making such investment in Farm Loan Bonds. But whether or not such investment would exceed its charter powers depended in turn upon the constitutionality of the act of Congress which created the obligor. And then upon what did the constitutionality of the act of Congress depend? It depended upon the powers and purposes of the banks which the act created. Said the Court (page 211):

> "We therefore conclude that the creation of these banks, and the grant of authority to them to act for the government as depositaries of public moneys and purchasers of government bonds, brings them within the creative power of Congress, although they may be intended, in connection with other privileges and duties, to facilitate the making of loans upon farm security at low rates of interest. This does not destroy the validity of these enactments any more than the general banking powers destroyed the authority of Congress to create the United States bank, or the authority given to national banks to carry on additional activities destroyed the authority of Congress to create those institutions."

Thus the constitutional question finally turned upon the construction and application of the act of Congress.

The Court itself and not the litigants raised the jurisdictional question and expounded its ideas in this language:

> "No objection is made to the Federal jurisdiction, either original or appellate, by the parties to this suit, but that question will be first examined. The company is authorized to invest its funds in legal securities only. The attack upon the proposed investment in the bonds described is because of the alleged unconstitutionality of the

acts of Congress undertaking to organize the banks and authorize the issue of the bonds. No other reason is set forth in the bill as a ground of objection to the proposed investment by the board of directors, acting in the company's behalf. *As diversity of citizenship is lacking, the jurisdiction of the district court depends upon whether the cause of action set forth arises under the Constitution or laws of the United States.* Judicial Code, Sec. 24.

The general rule is that, where it appears from the bill or statement of the plaintiff that *the right to relief depends upon the construction or application of the Constitution or laws of the United States,* and that such Federal claim is not merely colorable, and rests upon a reasonable foundation, the district court has jurisdiction under this provision.

At an early date, considering the grant of constitutional power to confer jurisdiction upon the Federal courts, Chief Justice Marshall said:

> 'a case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the Constitution or a law of the United States whenever its correct decision depends upon the construction of either,' Cohen v. Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257, 285; and again when 'the right or title set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction.' Osborn v. Bank of United States, 9 Wheat. 738, 822, 6 L. Ed. 204, 224.

These definitions were quoted and approved in Patton v. Brady, 184 U. S. 608, 611, 46 L. Ed. 713, 715, 22 Sup. Ct. Rep. 493, citing Little York Gold-Washing & Water Co. v. Keyes, 96 U. S. 199, 201, 24 L. Ed. 656, 658; Tennessee v. Davis, 100 U. S. 257, 25 L. Ed. 648; White v. Greenhow, 114 U. S. 307, 29 L. Ed. 199, 5 Sup. Ct. Rep. 923, 962; New Orleans, M. & T. R. Co. v. Mississippi, 102 U. S. 135, 139, 26 L. Ed. 96, 97.

This characterization of a suit arising under the Constitution or laws of the United States has been followed in many decisions of this and other Federal courts. See Macon Grocery Co. v. Atlantic Coast Line R. Co., 215 U. S. 501, 506, 507 L. Ed. 300, 303, 304, 30 Sup. Ct. Rep. 184; Shulthis v. McDougal, 225 U. S. 569, 56 L. Ed. 1210, 32 Sup. Ct. Rep. 704. The principle was applied in Brushaber v. Union P. R. Co., 240 U. S. 1, 60 L. Ed. 493, L. R. A. 1917D, 414, 36 Sup. Ct. Rep. 236, Ann. Cas. 1917B, 713 in which a shareholder filed a bill to enjoin the defendant corporation from complying with the income tax provisions of the Tariff Act of October 3, 1913. In that case, while there was diversity of citizenship, a direct appeal to this court was sustained because of the constitutional questions raised in the bill, which had been dismissed by the court below. *The repugnancy of the statute to the Constitution of the United States, as well as grounds of equitable jurisdiction, were set forth in the bill,* and the right to come here on direct appeal was sustained because of the averments based upon constitutional objections to the act. Reference was made to Pollock v. Farmers' Loan & T. Co., 157 U. S. 429, 39 L. Ed. 759, 15 Sup. Ct. Rep. 673, where a similar shareholder's right to sue was maintained, and a direct appeal to this court from a decree of the circuit court was held to be authorized.

* * * * * * *

The jurisdiction of this court is to be determined upon the principles laid down in the cases referred to. In the instant case the averments of the bill show that the directors were proceeding to make the investments in view of the act authorizing the bonds about to be purchased, *maintaining that the act authorizing them was constitutional,* and the bonds valid and desirable investments. *The objecting shareholder avers in the bill that the securities were issued under an unconstitutional law, and hence of no validity.*

> It is, therefore, apparent that the controversy concerns the constitutional validity of an act of Congress which is directly drawn in question. *The decision depends upon the determination of this issue.*"

It can make no difference on the jurisdictional question whether the challenge of the suit is to the constitutionality of an act of Congress or to the interpretation, effect and application of an act of Congress which is admittedly valid. In each instance an act of Congress is directly drawn in question and the Federal courts have jurisdiction.

In the lower Court the defendants rested heavily upon three cases:

Blumenstock Bros. v. Curtis Pub. Co., 252 U. S. 436;

Owensboro Waterworks Co. v. Owensboro, 200 U. S. 38;

Norton v. Whiteside, 239 U. S. 144.

But these cases on their facts are so broadly distinguishable from the case at bar that a cursory reading will show their inapplicability and we need to make no argument whatever to this Court to distinguish them. We only notice them because it is our general policy to examine whatever our opponents have to say.

XI.

NATURE OF THE DECREE.

The decree in this case is general. It does not say whether it is made for want of jurisdiction or for

want of equity. If it is made for the first reason it cannot be made for the second one. The motion to dismiss was made upon both grounds. We must presume, then, that the decree of dismissal was made for want of equity.

But if this Court shall conclude that the decree is sustainable upon the ground of want of jurisdiction and shall decide not to pass upon the question of the equity of the bill, then we respectfully ask *that the judgment on appeal shall be specifically limited to the issue of want of jurisdiction.* Such limitation of the judgment will leave the plaintiff free to bring a suit in the state Courts on the merits; and he should be left free to do so if the Court determines not to pass on the equities of the case. As the record now stands the judgment is *res judicata* on the merits.

Dated, San Francisco,
October 16, 1926.

Respectfully submitted,
D. Hadsell,
Joe G. Sweet,
E. A. Ingalls,
Attorneys for Appellant.

No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant,

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the East Bay Municipal Utility District, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

BRIEF FOR APPELLEES.

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Of Counsel.

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Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

Preliminary Statement of Facts.

The East Bay Municipal Utility District is a municipal utility district of the State of California organized pursuant to the provisions of an act entitled "An Act to Provide for the Organization, Incorporation and Government of Municipal Utility Districts, Authorizing Such Districts to Incur Bonded Indebtedness for the Acquisition and Construction of Works

and Property, and to Levy and Collect Taxes to Pay the Principal and Interest Thereon," approved May 23, 1921. (*Stat. 1921,* p. 245.) It contains within its corporate limits nine cities on the easterly side of San Francisco Bay, consisting of the Cities of Oakland, Alameda, Berkeley, San Leandro, Emeryville, Piedmont and Albany in the County of Alameda and of Richmond and El Cerrito in the County of Contra Costa. It contains no other territory. These nine cities through the instrumentality of the District are at present engaged in bringing to their inhabitants a muchly needed water supply from a distant source. For this purpose bonds were authorized by the voters of the District to the extent of $39,000,000. The validity of this bond issue has been approved by the Supreme Court of the State. *(In Re Validation of the East Bay Municipal Utility District Bonds, etc.,* 70 Cal. Dec. 270.) $10,000,000.00 worth of these bonds have been sold and blocks are being sold from time to time as the construction work of the District progresses and requires money for its payment. Contracts in excess of $17,000,000.00 have been let and because of the grave situation surrounding the District with respect to its water supply the work has been pushed with the utmost dispatch.

The necessities of the District for an additional water supply are unquestioned. The local supply beside being unsatisfactory is insufficient. In fact, at the present time there is less than a two months' supply in the reservoirs. A forced pumping of the wells which form a part of the supply (caused by this scarcity) has resulted in some of these wells becoming

salty (these wells are situate in the southeasterly part of Alameda County and close to the shore of San Francisco Bay), and if the following season should be a dry one the 450,000 people in the District will be in dire straits for water. This and other facts appear from the affidavit of Geo. C. Pardee, president of the District. (Tr. pp. 19-24.) This affidavit may be considered on motion to dismiss. *(Miller v. Min. Separation, Ltd.,* 275 Fed. 380.)

It also is the fact that the public utility at present supplying the District with water from local sources recognized the inadequacy of its supply and within two years petitioned the Railroad Commission of the State of California to permit it to issue securities to bring in a distant supply, which request was only refused because this utility District had been organized, had voted its bonds and promised in said proceeding to bring in such distant supply with all the resources within its power. (Aff. Geo. C. Pardee, Tr. pp. 21-23.)

Accordingly, the District after engineering studies by a board of engineers, consisting of General George W. Goethals, builder of the Panama Canal, William Mulholland, chief engineer and in charge of the Los Angeles water supply, and Arthur P. Davis, the present chief engineer of the District and former head of the United States Reclamation Service, selected the Mokelumne River as a source of supply and also selected a reservoir site on said river near Lancha Plana as the place for storing, impounding and diverting said waters.

While the bond issue of the District was before the courts for validation and so as to lose no time the District proceeded to call for bids for the building of its project. These bids were received before the bonds were validated. Immediately upon the validation decision contracts were let for the work.

The aqueduct lines of the District run in a southeasterly direction from the center of the City of Oakland to the said Lancha Plana reservoir in the foothills of the Sierras. They will cross several branches of the San Joaquin River in the delta region in the vicinity of Stockton. The call for bids divided the work into ten schedules. The contracts for all schedules west of the San Joaquin River were immediately let and because of the exigencies of the occasion contained liberal bonus clauses, giving the contractors a bonus for speedy completion. The contracts east of the river were let conditionally, that is to say, they contain clauses permitting their cancellation within certain times in the event the District deemed it expedient. The purpose of rushing the work to the San Joaquin River was so that in the event of a dry year an emergency supply might be pumped to the District from that source. While the quality of the San Joaquin water is not all that might be desired, it can by a proper treatment be made available for temporary use until the line is completed to the purer water of the Mokelumne. The bonds were only validated in September, 1925. Since that time the District has secured all of its right of way between Oakland and the San Joaquin River (more than forty-seven miles), and the construction of that portion of

its project is expected to be completed by approximately April or May, 1927; many miles of right of way east of the river have also been secured.

In September, 1925, and at the time of the letting of these contracts the District had pending and undetermined applications for certain necessary permits from the State and Federal Governments. These were as follows:

> (a) An application before the Division of Water Rights of the State of California for permission to divert the waters of the Mokelumne in order to supply 200,000,000 gallons daily to the District;
>
> (b) An application with the War Department of the United States to permit its aqueduct lines to cross certain navigable streams in the delta region; and, lastly,
>
> (c) An application before the Federal Power Commission in order that it might build its dam on and also inundate certain lands belonging to the United States in its proposed reservoir site.

Because in September, 1925, these permits had not yet been acted upon the board of directors of the District deemed it expedient not to obligate themselves to construct the project beyond the San Joaquin River. Therefore, all contracts beyond the San Joaquin River contained the clauses hereinbefore mentioned, permitting the District to cancel same without cost to it.

The appellant, S. D. Pine, sues as a citizen and taxpayer of the District. His original bill herein was filed September 25, 1925. This was some time after the bids had been received for the construction of the

District's project and on the day that the board of directors of the District met for the purpose of awarding the contracts; no preliminary injunction was asked for and none was issued. In the original bill and also in the amended bill appellant with great particularity alleged the failure of the District to secure *any* of these permits and alleged the failure of the issuance of any *of these permits* as a reason why the directors should be enjoined from letting any contracts. In addition to the District itself, its officers and directors and certain of the parties who had bid on the project were made defendants. Since this litigation has been pending *all* of the permits above specified have been granted; the Division of Water Rights of the State of California granting a permit for the water rights on April 17, 1926; the War Department of the United States granting a permit to construct the aqueduct lines beneath the navigable waters of the United States on March 4, 1926; and the Federal Power Commission granting a permit to use the Lancha Plana dam site and reservoir lands on June 24, 1926.

Statement of Issues.

To the original bill the defendant District and its officers alone appeared. They filed a motion to dismiss on grounds hereinafter alleged. The appellant made a motion to file an amended and supplemental bill. The motion to dismiss the original bill and the motion to file the amended and supplemental bill were heard together. The motion to dismiss was granted and judgment entered accordingly. The motion to file the amended and supplemental bill was denied.

The same considerations which required the dismissal of the original bill also required the denial of the motion to file the amended and supplemental pleading.

The granting of these various permits necessarily restricted the scope of appellant's attack on the actions of the District. His sole complaint now seems to be the legality of the District's action in taking a permit from the Federal Power Commission. While his contentions are stated in a variety of ways and with great detail the question really narrows down to this: Under its Organic Act can the East Bay Municipal Utility District apply for and accept a permit from the Federal Power Commission under the Federal Water Power Act?

As a preliminary to this consideration on the merits two questions of jurisdiction arise, (1) does the matter in controversy exceed the sum of $3,000.00? (2) does the matter in controversy arise under the Constitution and laws of the United States? As these matters each go directly to the jurisdiction of this court we will in our argument discuss them in the order named. We will also divide our argument into a third heading, viz.: That the facts pleaded do not constitute a valid claim in equity and that the bill falls short in stating a cause of action entitling the appellant to any relief at the hands of the court.

ARGUMENT.

I.

THE MATTER IN CONTROVERSY DOES NOT EXCEED THE SUM OF $3000.00.

Preliminary Statement.

Section 24 of the Judicial Code reads as follows:

> "The District Courts of the United States shall have original jurisdiction as follows: * * * Where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000.00 and (a) arises under the Constitution or laws of the United States * * *"

The jurisdiction of the District Court is not claimed on diversity of citizenship. In order to confer jurisdiction there must not only be a federal question (i. e., one arising under the Constitution and laws of the United States), *but the matter in controversy* must exceed the sum of $3,000.00.

> *Shewalter v. City of Lexington,* 134 Fed. 161;
> *Judicial Code,* Sec. 24.

The federal courts are of limited jurisdiction. There is no presumption in favor of jurisdiction. On the contrary it will be presumed such courts are without jurisdiction unless the same clearly appears. Justice Harlan of the Supreme Court of the United States, sitting in the Circuit Court for this District, in

> *United States v. Southern Pacific R. R. Co.,*
> 49 Fed. 293, 300,

said:

> "The first point made by the defendants is that the Circuit Courts of the United States possess no powers except such as the Constitution and the acts of Congress concur in conferring upon

them, and that the legal presumption is that every cause is without their jurisdiction *until and unless the contrary affirmatively appears. No doubt can exist as to the correctness of this principle.* (Citing cases.)" (Emphasis ours.)

To the same effect:

Shade v. Northern Pacific Ry. Co., 206 Fed. 353, 355 (citing many cases);

Farmers, etc. Bank v. Federal Reserve Bank, 274 Fed. 235;

Cleveland, etc. Co. v. Village of Kinney, 262 Fed. 980;

Byers v. McAuley, 149 U. S. 608; 37 L. Ed. 867.

The Amount in Controversy in a Suit of This Character Brought by a Taxpayer is the Amount of Taxes the Appellant Will Be Required to Pay if the Alleged Wrongful Act Be Not Enjoined.

Appellant sues as a taxpayer. (Par. II of his bill, Tr. p. 2; Par. II amended bill, Tr. p. 31.) In Paragraphs II and III of his amended bill he alleges the value of all his property and the assessed value of all the property in the District. Even if the entire $39,000,000.00 of the bond issue were misapplied the amount of his taxes for the entire issue over the entire life of the bonds will not amount to $3,000.00. This is admitted. (Appellant's Opening Brief, p. 56, lines 6-8.) In fact if the court cares to go into the mathematical calculation the ratio of his property to all that in the District is such that if the entire $39,000,000.00 were wasted his taxation will amount to about $275.00. To date his taxation for District purposes has been less than $5.00. (Par. II, Amended Bill.)

Under such circumstances the federal courts have uniformly held that in a suit to enjoin a threatened act on the part of a public body by a taxpayer *the amount in controversy is the pecuniary loss to him by the alleged illegal action sought to be enjoined.*

The court's attention is called to the following cases which fully sustain our contentions: In

Adams v. Douglas Co. (Cir. Ct. Dist. Kansas, 1868), 1 Fed. Cas. 106,

the court said:

> "We do not see how any other test of jurisdiction can be maintained, than that when more than five hundred dollars are required as the basis of jurisdiction, *it must mean an amount exceeding five hundred dollars which the plaintiff is liable to lose or gain by the result of the suit.* It could never have been intended by the act of Congress, that because a subject matter may have been involved in the proceeding, worth more than five hundred dollars, therefore any non-resident may have brought his suit in the Circuit Court, even though his own interest may have been a very small amount of the item of property. The result of such a doctrine would be, or might be, to throng these courts with proceedings in which a mere trifle might be claimed by the complainant, simply because that trifle comprised a part,—a small part,—of some large interest. A single stockholder in a banking or any other corporation, to the amount of fifty dollars, might thus gain in the Circuit Court a foothold for litigation, merely because the capital stock was a million. * * * *We understand the act of Congress to mean not that the party must litigate in reference to something more than five hundred dollars, but that he must bring into court, to be adjudicated by it, an interest exceeding five hundred dollars in something, which interest he shall claim to*

have as against his adversary, or, in case of injunction, which interest his adversary is about to put in jeopardy by his action, against which he invokes the protection of the courts. This doctrine, besides being well established by the course of decisions in the Supreme Court (see Green v. Liter), 8 Cranch (12 U. S.), 229; (Gordon v. Longest), 16 Pet. (41 U. S.) 97; (Childress v. Emory), 8 Wheat. (21 U. S.) 142), was recognized at a recent term of the Circuit Court for this district, Judge Miller presiding, when, in the case of Jewett v. Treasurer of Leavenworth County (Case No. 7312), the suit was dismissed because it did not appear that, in a proceeding to enjoin the treasurer, the plaintiff's tax exceeded five hundred dollars." (Emphasis ours.)

While this is an early case later decisions reaffirm the rule. A late case very much in point is

Scott v. Frazier, 258 Fed. 669.

The complainants brought suit to restrain defendants, who were public officers of the State of North Dakota, *from paying out public funds in the state treasury amounting to several hundred thousand dollars, from issuing bonds of the state for a much larger sum* and to have certain amendments to the state constitution and statutes declared null and void. The claim was specifically made in that litigation that the suit was brought not only upon the part of complainants *but on the part of all other taxpayers of the state.* The following extracts from the opinion prove this point:

On page 671 the court says:

"They (complainants) assert that the suit is brought on behalf of the state to protect it against the unconstitutional use of its funds and an un-

constitutional issue of its bonds. *That being the nature of the suit, it is claimed that the entire fund is the amount in controversy, and not the right of possible damage of the plaintiffs.*"

The court then goes on to say, page 672,

"In suits to enjoin a threatened tax levy, and that is the nature of the suit here, in all its aspects, *the authorities are uniform that the individual plaintiffs cannot aggregate their interests* for the purpose of making up the $3,000.00. Wheless v. City of St. Louis (C. C.), 96 Fed. 865; same case, 180 U. S. 379, 21 Sup. Ct. 402, 45 Law Ed. 583; Rogers v. Hennepin Co., 239 U. S. 621, 36 Sup. Ct. 217, 60 Law Ed. 469." (Emphasis ours.)

The bill was dismissed.

This case was appealed to the Supreme Court of the United States and the judgment of the lower court was upheld in an opinion containing the following language:

"the jurisdiction was invoked because of alleged violation of rights under the 14th Amendment. The complainants were taxpayers of North Dakota who alleged that suit was brought on behalf of themselves and all other taxpayers of the state. There was no diversity of citizenship, and jurisdiction was rested solely upon the alleged violation of constitutional rights. The District Court rendered a decree dismissing the bill on the merits, the judge stating that he was of opinion that there was no jurisdiction, and directing the dismissal on the merits to prevent delay, and to permit the suit being brought here by a single appeal.

"*There is no allegation that the loss or injury to any complainant amounts to the sum of $3,000.00.* It is well settled that in such cases as

this the amount in controversy must equal the jurisdictional sum as to each complainant. Wheless v. St. Louis, 180 U. S. 379, 45 L. Ed. 583, 21 Sup. Ct. Rep. 402; Rogers v. Hennepin County, 239 U. S. 621, 60 L. Ed. 469, 36 Sup. Ct. Rep. 217." (Emphasis ours.)

Scott v. Frazier, 253 U. S. 243, 244; 64 L. Ed. 883, 887.

Another decision of the Supreme Court of the United States dealing with this subject is

Colvin v. City of Jacksonville, 158 U. S. 456, 39 L. Ed. 1053.

The facts in that case are in point with those of the instant case. The suit was to enjoin the issue, sale and delivery of bonds. Just as in this case the suit is to enjoin the performance of a contract. *The complainant in that case claimed that the sale of the bonds would damage him and that the amount in controversy was the entire bond issue.* In this case complainant claims that performance of the contract will cause damage to himself (as well as to others) and that the amount of controversy is the sum of the contracts sought to be voided and annulled. In the *Colvin* case the court distinctly said it was the damage complainant would suffer which was the criterion of jurisdiction and dismissed the bill. The syllabus correctly stating the holding of the court is as follows:

"In a suit by a taxpayer to restrain the issue of municipal bonds, *the amount of taxes which plaintiff would have to pay, and not the entire issue of the bonds,* is the extent of his interest and the amount in controversy, and if that does not exceed $2,000.00, the Circuit Court has no jurisdiction."

In

Wheless v. St. Louis, 180 U. S. 379, 382; 45 L. Ed. 583, 585,

the suit was to restrain the city from levying or assessing the cost and expenses of improving a public street upon complainant's property. The decision turned upon the question of whether the matter in controversy exceeded $2,000.00, the then statutory amount. In the course of its opinion the court said:

> "The 'matter in dispute' within the meaning of the statute is not the principle involved, *but the pecuniary consequence to the individual party, dependent on the litigation;* as, for instance, in this suit the amount of the assessment levied or which may be levied, as against each of the complainants separately * * *. When made, neither one of these complainants will be called upon to pay a sum equal to the amount of $2,000.00 nor will any one of the lots be assessed to that amount." (Emphasis ours.)

In

Cowell v. City Water Supply Co., 121 Fed. 53,

it appears that the complainant brought suit "on behalf of himself and on behalf of all others of the same class" to declare certain corporate stock and certain mortgages void, but the court held that if his individual interest did not amount to the statutory sum it had no jurisdiction.

In

Risley v. City of Utica, 168 Fed. 737,

the court ruled that the matter in dispute was not the entire value of complainant's farm but the amount

of tax he would have to pay under an unauthorized tax levy by the city.

In

Walter v. Northeastern R. R. Co., 147 U. S. 370; 37 L. Ed. 206,

the holding of the court is correctly stated in the syllabus as follows:

> "The United States District Court has no jurisdiction of a suit in equity brought to enjoin the treasurers and sheriffs of several counties from issuing executions against or seizing the property of plaintiff for the purpose of collecting a tax based upon an assessment alleged to be unconstitutional and void, where the amount in dispute in each county is less than $2,000.00."

The following cases are also very much in point:

Citizens Bank v. Cannon, 164 U. S. 319; 41 L. Ed. 451;

Northern Pacific R. R. Co. v. Walker, 148 U. S. 391; 37 L. Ed. 494;

Rogers v. Hennepin Co., 239 U. S. 621; 60 L. Ed. 469;

Fishback v. Western Union Tel. Co., 161 U. S. 96; 40 L. Ed. 630;

Elgin v. Marshall, 106 U. S. 578, 582; 27 L. Ed. 249;

Holt v. Indiana Mfg. Co., 176 U. S. 68; 44 L. Ed. 374;

Lion Bonding Co. v. Karatz, 262 U. S. 77, 85; 67 L. Ed. 871, 878.

It has also been held that the right in dispute must be measured in terms of money. If it be a right

which cannot be measured in terms of money, regardless of how important a right it may be, the federal courts have not jurisdiction.

Whitney v. American Shipbuilding Co., 197 Fed. 777;

Oregon R. R. and Navigation Co. v. Shell, 125 Fed. 979.

In

Holt v. Indiana Manufacturing Co., 176 U. S. 68; 44 L. Ed. 374, 377,

in connection with a case in principle similar to the one at bar the Supreme Court of the United States, speaking through Chief Justice Fuller, said:

> "Treating this bill as setting up a case arising under the Constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over $2,000.00 applied; and the taxes in question did not reach that amount. *And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute.* New England Mortg. Security Co. v. Gay, 145 U. S. 123, 36 L. Ed. 646, 12 Sup. Ct. Rep. 815; Clay Center v. Farmers' Loan & T. Co., 145 U. S. 224, 36 L. Ed. 685, 12 Sup. Ct. Rep. 817; Citizens' Bank v. Cannon, 164 U. S. 319, 41 L. Ed. 451, 17 Sup. Ct. Rep. 89." (Emphasis ours.)

Answering Appellant's Argument on This Point. (App. Br. pp. 55-71.)

Appellant discusses this proposition in Sub. IX of his brief, pages 55-71. He seeks to escape the force of these decisions by claiming he is suing on behalf of *all* taxpayers similarly situated and for and on behalf of the District itself. (Amended Bill, Par. XXII, Tr. pp. 48-9.) That same allegation was made and asserted in *Scott v. Frazier, Cowell v. City Water Supply Co., Lion Bonding Company v. Karatz* and other cases heretofore cited by us. The answers made by the courts to similar contentions in these cases seem conclusive of the issue.

Appellant also relies on the case of *Brown v. Trousdale,* 138 U. S. 389. The court in the *Trousdale* case apparently considered that the aggregate amount of taxes which the litigant would be required to pay over a long course of years would exceed the statutory amount, and did not limit the jurisdictional amount to the tax for a single year. Even tested by this rule jurisdiction is not present in the instant case because it is admitted that in no event will the taxes that appellant is required to pay amount to the jurisdictional sum. (App. Br. p. 56, lines 6-8.) Regardless of what comfort appellant may secure from the *Trousdale* case that case was called to the attention of the court in the case of *Scott v. Frazier,* 253 U. S. 244; 64 L. Ed. 883, as appears from the report of that case in the Lawyer's Edition. Apparently the Supreme Court was not impressed because it did not cite the *Trousdale* case in its opinion and it reaffirmed the rule that jurisdiction depended upon the amount the

taxpayer must pay even though *his bill alleged he was suing on behalf of himself, others similarly situated and the public corporation of which he was a part.*

We have no quarrel with the California cases cited by appellant in this part of his brief. No question of jurisdictional amount such as is necessary in the federal courts is involved. The Superior Court of the State has jurisdiction in all equity cases, regardless of the amount involved. All that those authorities decide is that in a proper case a taxpayer may bring such suit. They are not controlling, however, upon the precise point before this court, because the value of the matter in controversy is not a condition precedent to jurisdiction.

The cases cited with reference to the right of a stockholder in a private corporation to begin a suit which should have been brought by the corporation itself upon the latter's refusal to act are clearly distinguishable. There a much different situation presents itself. Regardless of what the rule may be with reference to private corporations under such circumstances, the fact remains that by an unbroken line of decisions the Supreme Court of the United States and the other federal courts have universally made the interest of the individual taxpayer the test of jurisdiction in suits such as the one now before the court.

II.

THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION AND LAWS OF THE UNITED STATES.

Preliminary Statement.

All questions in this case were fully briefed in the court below. Each party therefore has the benefit of the position taken by the other. Appellant's theory in the court below and in his pleadings was that a federal question was raised because of the *non-existence* at that time of the permits later granted the District by the War Department to cross the navigable waters of the United States and by the Federal Power Commission to use the federal lands. The granting of these compelled a shift in his position. He now insists a federal question is before the court because of the claim that the District under its Organic Act cannot legally take a license from the Federal Power Commission. This manifestly is a matter of state and not federal concern. The decision, that is to say, the ultimate rights of the parties, will depend upon the state enactment and not upon the federal statute. The rights and limitations of the District are fixed by its Organic Act and by no federal legislation. The federal statute is only collaterally involved.

The Alleged Maladministration of the Affairs of the District Does Not Raise a Federal Question.

The grievance of the appellant is that there is a maladministration of the affairs of the District. He sued to prevent the officers of the District from letting certain contracts which in his opinion (but contrary

to the opinion of the board of directors of the District) will result in loss to the District and incidentally to himself as a taxpayer. His original object was and still must be to prevent the District from prosecuting this work on the ground that the actions of the board are not for the best interests of the District. These facts do not raise a federal question. There is no provision of the federal Constitution or of the federal law which protects a citizen, resident and taxpayer against maladministration by the duly elected public officials of a state political subdivision in the discharge of the duties conferred upon them by state law. His rights as a taxpayer and otherwise in this litigation do not arise *under* or depend *upon* the Constitution or laws of the United States. This is perfectly apparent from the bill itself. For example, he alleges that no permit has been received from the state government. Presumably the dire consequences that will flow from a lack of the permit from the federal government would also follow the lack of the permit from the state government, had it been denied. Yet if the lack of the state permit were the *sole* ground of plaintiff's grievance, there could not be the slightest contention that a federal question was raised. Does the allegation of absence of the federal permits or claimed inability to comply with a federal law raise a federal question? How can it? The absence of any permit affects him in the same way, and to the same extent. His right is the same in each case. His remedy is the same in each case; both his right and remedy depend upon the powers which the state law gives to the directors of the

municipality, and on no federal statute. He is suing, not for the right which is *dependent* upon any law of the United States, *but to be protected against the maladministration of the affairs of the District.* The absence of the federal permits does not make the matter a federal question. If there be maladministration it would be present whether caused by the absence of federal permits or state permits, or for any other cause. It would be just as painful for the taxpayer of the District to be taxed uselessly because of the lack of the state permit as it would be to be taxed because of the lack of the federal permit. Yet manifestly in the one case the federal court would not have jurisdiction; how can it have it in the other, when in both cases the remedy sought is the same and the rights of the parties are the same, and in neither case would the ultimate relief depend upon the Constitution or laws of the United States?

A case in our opinion decisive on the issues herein is that of

Owensboro Water Works Company v. City of Owensboro, 200 U. S. 38; 50 Law. Ed. 361.

In that case, as in the instant case, the complainant sought the aid of the federal courts to enjoin an official act of the city. The bill was dismissed on the ground that there was no federal question. The complainant contended that certain public funds were being used for an unlawful purpose, that is to say, they had been voted for one purpose and were being used for another, and it sought to enjoin the sale of bonds and the use of this money, contending that as

a taxpayer it was being deprived of property without due process of law. In the course of its opinion, the United States Supreme Court said:

> "The bill presents the case of the diversion, or the intended diversion, by a municipal corporation, of certain funds which, under legislative sanction, it had collected from taxpayers for a specific public object, which funds were not applied to the object for which they were raised, and which failure of duty on the part of the corporation so to apply them may ultimately cause increased taxation if the full amount originally intended to be applied to the particular object named by the legislature is to be collected.
>
> We share with the court below the difficulty in understanding how such a case can be regarded as one arising under the Constitution of the United States."

It is not every case where the federal law is collaterally involved that presents a federal question. The state courts are not prohibited from construing acts of Congress or the Constitution. It has been held

> "that a case cannot be removed from a state court simply because in the progress of the litigation it may become necessary to give a construction to the Constitution and laws of the United States."
>
> *State of Tennessee v. Union & Planters Bank,* 152 U. S. 454; 38 Law. Ed. 511, 514.

To the same effect:

> *Little York Gold, etc. Co. v. Keyes,* 96 U. S. 199; 24 Law. Ed. 656.

The right of the party must depend upon the federal law. If the federal matter is merely collateral

to the issue, then the court has no jurisdiction. This is aptly illustrated by the case of

Norton v. Whiteside, 239 U. S. 144; 60 Law. Ed. 239.

The opinion in this case is too long to be quoted herein, but the case is very much in point with the instant case. In that case the complainants sought to do substantially the same thing the complainant seeks to do in this case. The claim was made that the federal courts had jurisdiction because the action arose under the Constitution and laws of the United States. On its face the bill so stated. The court held, however, that this was not sufficient, saying:

> "This, however, does not suffice to solve the question, since it is settled that a mere formal statement to that effect is not enough to establish that the suit arises under the Constitution and laws of the United States, but that it must appear that 'it really and substantially involves a dispute or controversy respecting the validity, construction, or effect of some law of the United States, upon the determination of which the result depends. And this must appear not by mere inference, but by distinct averments according to the rules of good pleading.' "

While the bill made reference to many federal statutes which it was claimed set up the federal question *(just as does this appellant),* in a well reasoned opinion by Chief Justice White, the court shows that such matters were only collaterally involved; that the rights of the parties really depended upon the proper construction of the riparian law applicable to the controversy; that this was a state and not a federal matter; *that the acts of Congress with reference to*

navigation and similar matters relied on were purely incidental to the main controversy. Similarly, in this case the complainant's rights depend not upon any federal law, but upon the laws of the State of California with reference to the protection that a citizen and taxpayer has against alleged abuse of authority by duly elected officials of a municipality.

Blumenstock Bros. etc. v. Curtis Publishing Co., 252 U. S. 436; 64 Law. Ed. 649,

is another case in which the federal question, viz., the effect of the commerce clause, was only collaterally involved. The court held that the mere incidental relation to interestate commerce of the transactions narrated in the complaint was not enough to raise the federal question. For brevity, we quote in part from the syllabus only:

> "In any case alleged to come within the federal jurisdiction, it is not enough to allege that questions of a federal character arise in the case, but it must plainly appear that the averments attempting to bring the case within such jurisdiction are real and substantial."

In

Newburyport Water Co. v. Newburyport, 193 U. S. 562; 48 Law. Ed. 795, 799,

the Supreme Court of the United States defines its attitude upon this matter as follows:

> "If jurisdiction is to be determined by the mere fact that the bill alleged constitutional questions, there was, of course, jurisdiction. But that is not the sole criterion. *On the contrary, it is settled that jurisdiction does not arise simply because an averment is made as to the existence of a constitutional question, if it plainly appears*

> *that such averment is not real and substantial, but is without color of merit."* (Citing many cases.) (Emphasis ours.)

In another case,

> *Hamblin v. Western Land Co.,* 147 U. S. 531; 37 Law. Ed. 267,

with reference to the subject matter under discussion, the court said:

> "It is doubtful whether there is a federal question in this case. A real and not a fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts."

In *Austin v. Gagan,* 39 Fed. 626 (Cir. Ct. N. D. Cal.), it was held that the record must show some disputed construction of a federal statute in order to confer jurisdiction. Where the federal law is undisputed, jurisdiction does not attach.

In *Theurkauf v. Ireland,* 27 Fed. 769, 770 (Cir. Ct. N. D. Cal.), the court said:

> "But it does not appear that there is any disputed construction of any statute of the United States involved. It does not appear but that both parties agree upon the construction of the preemption laws * * *. There is nothing to show that any disputed question will arise, and this must affirmatively be shown in order to make it affirmatively appear that the court has jurisdiction."

To the same effect, see:

> *California Oil & Gas Co. v. Miller,* 96 Fed. 12;
> *Crystal Springs etc. Co. v. City of Los Angeles,* 76 Fed. 148.

Answering Appellant's Argument on This Point. (App. Br. pp. 71-83.)

Appellant deals with this question in Sub. X of his brief, pp. 71-83. No attempt is made to answer the authority we have cited. It is merely mentioned without discussion. He relies entirely upon the fact—*not disputed*—that because the Federal Water Power Act permits the federal government to take over the project at the end of fifty years *with compensation* (Sec. 14, Federal Water Power Act; 41 Stat. at Large, p. 1063) that this fact, coupled with his claim that the District cannot take the license with these provisions, raises the federal question. We submit the very statement of the matter shows the non-existence of any federal question. That the Federal Water Power Act permits this recapture no one disputes. To determine whether or not the defendant District may legally ask for such license and accept same from the Federal Power Commission, must be determined by construction of the Organic Act of the District, and the laws of the State of California. There is no federal statute attempting to define the powers of such a District. It is entirely a matter of state concern.

The United States Supreme Court in dealing with a case where reference was made to a federal statute, and where jurisdiction was sought to be upheld on the ground that a federal question was involved, stated the rule thusly:

> "A suit to enforce a right which takes its origin in the laws of the United States is not necessarily or for that reason alone one arising under those laws, for a suit does not so arise unless it really

and substantially involves a dispute or controversy respecting the validity, construction, or effect of such a law *upon the determination of which the result depends.*" (Emphasis ours.)

Shulthis v. McDougal, 225 U. S. 561, 569; 56 L. Ed. 1205, 1211.

Many cases are cited in the opinion last quoted to the same effect.

See, also,

Bankers etc. Co. v. Minneapolis etc. Co., 192 U. S. 372, 381; 48 L. Ed. 484, 488.

In a recent case, the Supreme Court again said:

"The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this court to entertain the appeal; and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below." (Citing cases.)

Corrigan v. Buckley. (U. S. Sup. Ct. Advance Opinions decided May 24, 1926.)

The right of the District to accept such license and its powers in the premises depend upon the laws of the State of California; hence the controversy does not arise "under the Constitution or laws of the United States."

III.

THE FACTS ALLEGED DO NOT CONSTITUTE A VALID CLAIM IN EQUITY.

The District Has Complete Power to Do All Lawful Things Necessary or Convenient to Carry Out Its Purposes.

The District's Organic Act is found in Statutes of the State of California of 1921, page 245. The pertinent provisions are as follows:

> Section 4. "The government of every municipal utility district so created and established shall be vested in a board of five directors, * * *"
>
> Section 11. "The board of directors shall constitute the legislative body of said district and shall determine all questions of policy * * * The board of directors shall supervise and regulate every utility owned and operated by the district, including the fixing of rates, rentals, charges and classifications, and the making and enforcement of rules, regulations, *contracts,* practices and schedules, for and in connection with any service, product or commodity owned or controlled by said district."
>
> Section 12. "Any municipal utility district incorporated as herein provided shall have power: * * * * * * * *
>
> FOURTH. To take by grant, purchase, gift, devise, *or lease, or otherwise acquire,* and to hold and enjoy, *and to lease* or dispose of, real and personal property of every kind within or without the district, necessary to the full or convenient exercise of its powers.
>
> FIFTH. To *acquire,* construct, own, operate, control *or use,* within or without, or partly within and partly without, the district, *works for supplying the inhabitants of said district* and municipalities therein, without preference to such municipalities, *with light, water, power,* heat, transportation, telephone service, or other means of communication, or means for the

disposition of garbage, sewage, or refuse matter; *and to do all things necessary or convenient to the full exercise of the powers herein granted;* also to purchase any of the commodities or services aforementioned from any other utility district, municipality or private company, and distribute the same * * *."

"SIXTH. To have or exercise the right of eminent domain in the manner provided by law for the condemnation of private property for public use. To take any property necessary or convenient to the exercise of the powers herein granted, whether such property be already devoted to the same use or otherwise. In the proceedings relative to the exercise of such right the district shall have the same rights, powers and privileges as a municipal corporation.

SEVENTH. To construct works across or along any street or public highway, or over any of the lands which are now or may be the property of this state, and to have the same rights and privileges appertaining thereto as have been or may be granted to the municipalities within the state, and to construct its works across any stream of water or water course. The district shall restore any such street or highway to its former state as near as may be, and shall not use the same in a manner to unnecessarily impair its usefulness."

* * * * * * * *

"TENTH. *To make contracts,* to employ labor, *and to do all acts necessary and convenient for the full exercise of the powers herein in this act granted."*

Section 26. "All matters and things necessary for the proper administration of the affairs of said district which are not provided for in this act shall be provided for by the board of directors of the district by ordinance."

The statutes above quoted state the power and authority of the board of directors of the defendant

District. Clearly the acts sought to be enjoined are within the powers and authority granted by the provisions of law above quoted.

The pertinent provisions of the Federal Water Power Act (41 Stats. at Large, p. 1063) are as follows: In Section 3 of the Act the term "municipality" is defined

> "a city, county, irrigation district, drainage district, or other political subdivision or agency of a state competent under the laws thereof to carry on the business of developing, transmitting, utilizing or distributing power".

The term "municipal purposes" is defined as

> "all purposes within municipal powers, as defined by the Constitution or laws of the State, or by the charter of the municipality".

Section 4, subdivision (d) of the same Act, in defining the powers of the Commission, in so far as material, is as follows:

> "To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State *or municipality* for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission, and utilization of power across, along, from or in any of the navigable waters of the United States, or upon any part of the public lands and reservations of the United States (including the Territories) or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided."

Section 6 provides that licenses shall be issued for a period not exceeding fifty years. Section 14 provides that at the expiration of the license period the Government may take over the works upon making full compensation to the licensee and giving two years' notice. Under Section 15 of the Act the Commission is given power to renew the license.

There is no question but that the Commission has the right to issue this license. There is nothing stated in the bill nor in the amended bill to show any lack of such power. The claim of the appellant is that the District has not the power to accept such a license. (This, as we have shown in the previous subdivision of the brief, is not a matter arising under the constitution or laws of the United States.) The quotations from the Organic Act of the District show the fallacy of such contention. The license from the United States is a contract. (*Alabama Power Co. v. Gulf Power Co.,* 283 Fed. 606, 615.) Certainly in securing from the Federal Power Commission the use of federal lands for the purpose of supplying water, heat and power for fifty years to its inhabitants the District is performing an act in line with the powers conferred upon it by law. The District is given full power "to take by grant * * * lease or otherwise acquire * * * property * * * necessary to the full *or convenient* exercise of its powers". (Sec. 12, sub. 4.) It is also given full power to acquire works for supplying the inhabitants of the District with light, water and power. (Sec. 12, sub. 5.) How it shall exercise these powers and what contracts and agreements it shall make in so doing are matters which

the law has committed solely to the discretion and judgment of its Board of Directors.

Where Discretion is Committed to a Public Board the Courts Will Not Interfere With the Exercise of that Discretion.

The law is well settled and the authorities are uniform that where duties of a discretionary nature are conferred on public officers the Courts cannot in any way control or enjoin the exercise of such discretion in the absence of a showing of fraud, duress or collusion.

In the early case of

Goszler v. Corporation of Georgetown, 6 Wheaton 593, 5 Law. Ed. 339,

Mr. Chief Justice Marshall held that the constituted authorities of a municipal corporation may decide when and how the streets may be graded. He said (page 339 L. Ed.):

> "There can be no doubt that the power of graduating and leveling the streets ought not to be capriciously exercised. Like all power, it is susceptible of abuse. But it is trusted to the inhabitants themselves who elect the corporate body, and who may therefore be expected to consult the interests of the town."

In

City of East St. Louis v. United States etc., 110 U. S. 321, 28 L. Ed. 162,

at L. Ed. page 163 the Court said:

> "But the question, what expenditures are proper and necessary for the municipal admin-

> istration, is not judicial; it is confided by law to the discretion of the municipal authorities. No court has the right to control that discretion, much less to usurp and supersede it. To do so, in a single year, would require a revision of the details of every estimate and expenditure, based upon an inquiry into all branches of the municipal service; to do it, for a series of years, and in advance, is to attempt to foresee every exigency and to provide against every contingency that may arise to affect the public necessities."

The test seems to be, is the act one which is discretionary. It is immaterial whether it be legislative or executive. The rule is thus stated in *High on Injunctions* (Section 1326), as follows:

> "The true test in all such cases is as to the nature of the specific act in question, rather than as to the general functions and duties of the officers. If the act which it is sought to enjoin is executive instead of ministerial in its character, or if it involves the exercise of judgment and discretion upon the part of the officer as distinguished from a merely ministerial duty, its performance will not be prevented by injunction."

This language is quoted with approval in the decision in

Glide v. Superior Court, 147 Cal. 21.

In that case in dealing with a matter of discretion committed to the board of supervisors of a county the court said:

> "We have said that no doubt can be entertained but that the jurisdiction over these matters is primarily vested with the board of supervisors, and that so long as the board is, as here, acting within the scope of its jurisdiction, judicial interference with its proceedings is improper and cannot be

tolerated. In confirmation of the views here expressed reference may be made to the case of *Rice v. Snider et al.* (No. 13,681, Circuit Court of the United States for the Ninth Judicial Circuit), where this precise question in this identical case was presented to Circuit Judge Hunt, in an effort to invoke the aid of the federal courts to restrain the supervisors of Yolo County in this very proceeding. Judge Hunt, in refusing the petition for an injunction, after setting forth the principle that courts will not interfere by an injunction with legislative action of a municipal corporation unless the proposed legislation is beyond the scope of the corporate power, and its passage would under the circumstances work an irreparable injury, declared that under the law it was the duty 'of the board of supervisors alone to ascertain the fact whether the land is or is not reclaimed, and thereafter to exercise a judgment and discretion as may be proper and expedient. To hold that the lands are reclaimed would be to pass upon the disputed facts of the case; it would not be proper at this time; it would in effect be to control the action of the board of supervisors by injunction. But, as said, the ascertainment of the fact rests with the board alone and does not affect their jurisdiction.' "

Judge Cooley says (Const. Lim. 3d Ed. page 168):

"The moment a court intervenes to substitute its own judgment for that of the legislature in any case where the Constitution has vested the legislature with power over the subject that moment it enters upon a field where it is impossible to set limits to its authority and where its discretion alone will measure the extent of its interference."

The foregoing authorities, particularly *High on Injunctions,* show that the test is not necessarily whether the act be legislative or executive but whether

it be an act in which discretion and judgment are conferred upon the officer exercising it, in other words, distinguishing the act from a mere ministerial duty. The acts of the board of directors of the utility district brought in question are not alone administrative or executive but are also legislative.

Nickerson v. San Bernardino Co., 179 Cal. 518.

In the course of its opinion the court said (page 522):

> "It is not necessary to enter into any extended discussion of this assigned error. The ruling of the court was clearly within a well-recognized principle of law controlling the power of courts with respect to the review of proceedings of municipal bodies acting in their legislative or *discretionary* capacities. When the legislature has committed to a municipal body the power to legislate on given subjects *or has committed to it judgment or discretion as to matters upon which it is authorized to act,* courts of equity have no power to interfere with such a body in the exercise of its legislative or discretionary functions. That the power conferred on the board of supervisors by law relative to the purchase of land for a hospital site, the erection of hospital buildings and their equipment, was both legislative and discretionary in character is not open to dispute. The law cast upon the board the duty of determining whether in its judgment the public necessity required that the county should acquire a new county hospital and conferred upon it the power necessary to accomplish this if it should so determine." (Emphasis ours.)

In re City and County of San Francisco, etc., 191 Cal. 172, 184,

was a case where the City and County of San Francisco sought to enter into a contract with the County

of Alameda for the care of tubercular patients. The court said (page 184):

> "The argument that the agreement is an improvident and unwise one for the City to make is one often heard in opposition to municipal contracts. It is effectually answered by a restatement of the rule that * * *"

and then follows the quotation from the *Nickerson* case last above quoted.

Further citation of authority is merely cumulative.

The matter is also covered by two Code sections. Section 3423 of the Civil Code reads as follows:

> "An injunction cannot be granted * * *
> Seventh. To prevent a legislative act by a municipal corporation."

Section 526, Subdivision 7, of the Code of Civil Procedure, contains the identical inhibition as that contained in the Civil Code.

Answering Appellant's Argument on This Point. (App. Br. pp. 14-50.)

We feel that the provisions of the Organic Act of the District and the authorities last cited by us effectually answer appellant. It is in order, however, to briefly comment on appellant's position and the authorities relied on by him to support it.

We have no particular quarrel with the holding of the cases cited by appellant in the discussion of this point on pages 20 to 30 and also on pages 44 and 45 of his opening brief. They are not at all in point. We concede that if a public board is placed in possession of public property to be used for public purposes

it cannot sell or dispose of such property contrary to the public good. For example, the City and County of San Francisco received a grant from the federal government to use certain lands for its Hetch Hetchy project in order to furnish a water supply and incidental electric power to its inhabitants. Obviously the Board of Supervisors of that city could not sell these rights to a public corporation or do any other similar act with reference thereto which would be a repudiation of their public trust. Such acts would be inconsistent with the responsibility and duties entailed upon them by virtue of their office. But on the other hand, if in order to get a water supply and a reservoir site, it was necessary to enter into contractual relations with the federal government (as the City and County of San Francisco did), which agreements contained forfeiture clauses, (as the Raker Act does) a much different situation presents itself. There in entering into such a agreement the public body is performing a duty consistent with its trust and is making the agreement which best appeals to it in order to accomplish a desired result and to manage the public business which is committed to its care.

In the instant case the license that the District has from the federal government can only be forfeited in the event that there is a violation of its terms. These terms are reasonable and we know of no rule of law which prevents a public body from entering into such agreements; certainly the cases cited by appellant do not so hold. It is one thing for a public board to do an act inconsistent with its powers and duties. It is quite another thing to perform an act

consistent with these powers. In the cases cited by appellant the public board generally was trying to evade its responsibility. Here the board is performing its duty in securing a water supply in the only way it can be secured. The United States has the land, the District needs it and the board is securing it in the manner provided by law. Its Organic Act contains no inhibition against such agreement. On the contrary it gives the board full power and discretion to freely lease and contract.

As a matter of fact appellant's entire argument is based upon the premise that any money spent for building a dam on these federal lands will be lost to the District. This is an unwarranted assumption. If the District observes the terms of its license it will enjoy the use of these federal lands for at least fifty years and perhaps forever. It will not be deprived of same even at that time without full compensation. The government must give reasonable notice if it intends to take over the project. (Fed. Water Pow. Act, Sec. 14.) Then again, the only part of the project that can be taken over will be that which has to do with the generation of electrical energy as the permit of the District is so limited by the Act. (Sec. 3.) Let us assume for the argument the worst possible situation from the standpoint of the District. Let us assume at the end of fifty years the government will take over the dams and the land and the power construction. Wherein does the District lose anything? Full compensation must then be made to the District for the property taken and full severance damages must be allowed. (Sec. 14.) Even if the

"project", that is, the power rights be taken by the government, the water will still be in the stream to be used by the District after it has gone through the power house; the pipe lines will still be there for conveying the water to the District; it may be a very profitable investment to use these lands as is contemplated for fifty years and then, even if they are taken over at that time, by some other system of works arrange to take the water to the District through some other means of diversion. On the other hand, the government may renew the license, as it is permitted to do by Sec. 15. Whether it does or does not do so is immaterial at this stage of the proceeding, because the entire matter is a question of business judgment committed to the Board of Directors of the District to determine how and when these various works shall be built and what agreements and contracts it shall make in so doing.

If counsel were right in their contentions no public service corporation, nor any political subdivision, could ever take a license under the Federal Water Power Act. It has been held that private public service corporations cannot dispose of their property in such a way as to impair the performance of their public trust. (The same argument that appellant makes with reference to a municipal corporation.)

Thompson on Corporations, 2nd Ed., Vol. 3, Sec. 2426, page 347; Section 2427, page 349;
Thomas v. West Jersey R. Co., 101 U. S. 71, 24 L. Ed. 950, 952.

If appellant is correct in his contention herein that the District because of its public trust is precluded

from taking such a license, then every permit from the federal government under the Federal Water Power Act to either any public corporation or to any private corporation acting as a public utility is likewise invalid. Such a conclusion would be absurd. It would mean practically no licenses at all could be granted because as this court well knows most of the power sites in this state contain government land and the business is in the hands of public utility corporations. The answer is that in taking such licenses such corporations and this district are furthering the purposes for which they were created.

Even without a provision in the Organic Act a public corporation may make any lease or agreement consistent with its purposes and rent facilities for distributing water for a limited time.

Beasley v. Assets Conservation Co., 230 Pac. 411, 413 (Wash.)

In that case an irrigation district without special authority except such as is necessarily implied in its organic act made a contract with a private corporation to procure water. In the course of its opinion the Supreme Court of Washington said:

> "We are satisfied that the contract is not ultra vires; that is, beyond the power of the district. Under our statutes (Rem. Code, Sec. 6416 et seq.), the ultimate purpose of an irrigation district is to procure water for the purpose of irrigating the lands within its boundaries. Generally this water is furnished by a distributing system owned by the district itself, but it is not necessarily confined to procuring water in that way. Its powers are not only such as are granted in express words, but also those necessarily or fairly implied in or inci-

> dent thereto, or indispensable to its declared objects and purposes. * * * *Almost any effort to procure water for irrigation purposes would be within the expressed or implied powers of an irrigation district.* The sole purpose of the contract involved here was to procure irrigating water. The district was undertaking to procure a system of its own. During the interim it was securing the water in any way it could. To hold that an irrigation district has no power to make this contract would be to deprive it of the power of self preservation." (Emphasis ours.)

If appellant were to prevail, the agreement made by the City of San Francisco and construed in

> *In re City and County of San Francisco,* 191 Cal. 172, 184,

and upheld by the Supreme Court of this state would be invalid.

In taking this license the Board of Directors of the District has acted on but one of the many matters of business judgment and discretion which have been committed to their care. They are in no different situation with respect to this matter than they were in their original determination to go to the Mokelumne River for a source of supply. If instead of going to the Mokelumne they had gone to the Calaveras or the Stanislaus or the Tuolumne or some other stream, could this appellant or any other taxpayer of the District successfully maintain an action in the courts to compel them to go to the Mokelumne? The answer of the court under such circumstances would be sweeping and it would be that the matter was one that had been committed by law to the chosen agents of the people

as represented in the Board of Directors of the District; that on a matter committed to their discretion their judgment is final. There is really no difference in principle between the discretion given the board in the supposed case and their discretion in the matter under review in this case.

CONCLUSION.

The tremendous importance of this matter to the District and its inhabitants is so apparent that it needs no statement; aside from the monetary loss of the many millions of dollars already invested, the danger to the health and comfort of the community and the effect of an adverse decision on the future of the District, cannot be overstated. We feel under all the circumstances that the judgment of the lower court should be approved on each of the grounds herein discussed.

Dated, Oakland,
November 10, 1926.

Respectfully submitted,

T. P. WITTSCHEN,
Attorney for Appellees.

MARKELL C. BAER,
GEO. W. LUPTON, JR.,
Of Counsel.

No. 4890

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

S. D. PINE,

Appellant.

vs.

EAST BAY MUNICIPAL UTILITY DISTRICT, GEORGE C. PARDEE, GRANT D. MILLER, DAVID P. BARROWS, JAMES H. BOYER and ALFRED LATHAM, Individually and as Directors of the EAST BAY MUNICIPAL UTILITY DISTRICT, JOHN H. KIMBALL, Individually and as Secretary of said District, and of the Board of Directors thereof, and GEORGE C. PARDEE, as President of the Board of Directors of said District,

Appellees.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES.

DELANCEY C. SMITH,
Balfour Building, San Francisco,
Amicus Curiae.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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Appellees.

BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLEES.

INTRODUCTORY.

We sought and obtained by stipulation from the attorneys for appellant and appellees consent to filing of this brief in support of the position of appellees.

This brief is submitted on behalf of Twohy Brothers Company and J. F. Shea Company who jointly hold large and important contracts from the appellee, East Bay Municipal Utility District, for the construction

of the pipe aqueduct of the Mokelumne River project by which the water will be brought from the Lancha Plana Dam Site to the municipalities forming the appellee district.

Twohy Brothers Company and J. F. Shea Company were named as defendants in the original complaint but were not served with process. They were awarded contracts by the District on September 25, 1925, since which time they have performed a large part of the work covered thereby and it becomes apparent that they are directly and vitally interested in the affirmance of the steps taken by the District seeking to consummate the construction of the entire Mokelumne River project which is under attack in this case by appellant.

We have read the briefs submitted by appellant and appellees and are convinced that the appellees have sufficiently and ably covered the issues involved in the case and successfully answered the points made by appellant. It has occurred to us, however, that our interest is of sufficient magnitude to justify a disclosure of our position to the court together with such supplementary suggestions as we feel may consistently be added to the views expressed so ably by counsel for appellees.

I.

THE FACTS ALLEGED DO NOT CONSTITUTE A VALID CLAIM IN EQUITY.

BY THE ORGANIC LAW UNDER WHICH IT IS ORGANIZED, THE APPELLEE DISTRICT IS SPECIFICALLY GIVEN POWER TO ACQUIRE PROPERTY BY LEASE AND THE LICENSE TAKEN BY THE DISTRICT FROM THE UNITED STATES AND UNDER ATTACK HERE BY APPELLANT AS IN EXCESS OF ITS POWER FOR THE DISTRICT TO TAKE, BEING IN REALITY A LEASE, THE ACTION OF THE DISTRICT IS CLEARLY WITHIN ITS POWERS.

The law is well settled that the courts will not interfere with the discretionary acts of public boards when performed in the exercise of their authority and in the absence of fraud. Counsel for appellees has made this point and ably supported it with authorities in his brief.

There being no claim of fraud here involved it becomes necessary only for the court to determine whether the action of the board, which is under attack here, was in the exercise of the discretionary powers vested in the board.

(a) The District is Empowered to Take Property by Lease.

The complaint alleges in paragraph III the organization and existence of the District under an Act of the Legislature of the State of California, approved May 23, 1921. (Trans. p. 3.)

Section 12 of this Act, in defining the powers of the District, provides among other things that the District may

> "take by grant, purchase, gift, devise, *or lease or otherwise acquire,* and to hold and enjoy, and to lease or dispose of, real and personal property of every kind within or without the District neces-

sary to the full and convenient exercise of its powers." (Italics ours.)

Statutes 1921, page 251.

It cannot be disputed that the power to lease real property for the exercise of its corporate functions is specifically granted by the quoted provision.

Let us assume that land acquired by the District can only be acquired by lease. It could not be claimed for this reason that the District should refuse to act because it was without power to take by lease. In such a case the Statute would mean nothing. The Legislature foresaw the possibility of such a contingency, and, in order that the district in such a case might properly function, gave the District the power to acquire the needed land by lease. The grant of this power is self-evident and does not require citation of authority in view of the clear provision of the Statute.

But aside from the fact that the power to acquire lands by lease is specifically given the District by the Act the right to do so is implied by law. The District is in fact a municipal corporation.

In re Issuance of Bonds of Orosi Public Utility District, 196 Cal. 43.

"A municipal corporation may take a lease of real property for a legitimate corporate purpose." 28 *Cyc.* 609 and cases there cited.

This very question has been decided by the Supreme Court of the State of California in the case of *City and County of San Francisco v. Boyle,* 195 Cal. 426; 233 Pac. 965, in which a writ of mandate was sought to compel the respondent, City Auditor, to audit and approve a claim and demand on account of an agree-

ment made between the municipality and an exposition company pursuant to proceedings had before the board of supervisors.

In that case, speaking for the court it was said by Justice Richards:

> "The first contention which the respondent makes in support of his refusal to audit and approve said demand is the contention that the City and County of San Francisco has, under the terms of its charter, no power to enter into a lease of privately owned real estate. We are disposed to hold that this general objection is without merit. The charter of said municipality, in Article 1, Section 1, thereof, provides that it 'may purchase, receive, hold and enjoy real and personal property.' * * * On the other hand, it is a general rule of interpretation applicable to charters that the broad power to 'purchase, receive, hold and enjoy real and personal property' embraces and includes the lesser power to lease the same classes of property. 3 Dillon on Municipal Corporations 5th ed., p. 1593; Hackett v. Emporium Borough School Dist., 150 Pa. 220, (24 Atl. 627); 28 Cyc., pp. 604, 605 and cases cited."

A municipal corporation has power to lease real estate needed by it to carry out any of its acknowledged powers and purposes.

Davies v. City of New York, 83 N. Y. 207.

(b) The License Issued From the Federal Power Commission to the District is in Reality a Lease.

There being no doubt that the District may acquire real property by lease, the question arises whether or not the "license" issued to the District by the Federal Power Commission is within the meaning of the term "lease". We respectfully submit that it is.

The pertinent provisions of the Federal Water Power Act (41 U. S. Stats. at Large, 1063) follow.

Section 3 defines project:

"Project means complete unit of improvement or development, consisting of a power house, all water conduits, all dams * * * all water rights, rights of way, ditches, dams, reservoirs, lands, or interest in lands, the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit."

Section 4 (a) * * * The licensee shall grant to the commission or to its duly authorized agent or agents, at all reasonable times, free access to such project, addition, or betterment, and to all maps, etc."

Section 6. "That licenses under this Act shall be issued for a period not exceeding fifty years * * *. Licenses may be revoked only for the reasons and in the manner prescribed under this Act, and may be altered or surrendered only upon mutual agreement between the licensee and the commission after ninety days' public notice."

Section 9 (e) "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this Act; for recompensing it for the *use, occupancy* and *enjoyment* of its lands or other property; and for the expropriation to the government of excessive profits until the respective States shall make provision for preventing excessive profits or the expropriation thereof to themselves, etc. * * *"

Section 14. "That upon not less than two years' notice in writing from the commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in Section 3 hereof, and covered in whole or in part by the license, or the right to take

over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission."

Section 16. "That when in the opinion of the President of the United States, evidenced by a written order addressed to the holder of any license hereunder, the safety of the United States demands it, the United States shall have the right to enter upon and take possession of any project, or part thereof, constructed, maintained, or operated under said license, for the purpose of manufacturing nitrates, explosives, or munitions of war, or for any other purpose involving the safety of the United States, to retain possession, management, and control thereof for such length of time as may appear to the President to be necessary to accomplish said purposes, and then to restore possession and control to the party or parties entitled thereto; and in the event that the United States shall exercise such right it shall pay to the party or parties entitled thereto just and fair compensation for the use of said property as may be fixed by the commission upon the basis of a reasonable profit in time of peace, and the cost of restoring said property to as good condition as existed at the time of taking over thereof, less the reasonable value of any improvements that may

be made thereto by the United States and which are valuable and serviceable to the licensee."

Section 26. "That the Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the District Court of the United States in the district in which any project or part thereof is situated for the purpose of revoking for violation of its terms any permit or license issued hereunder, or for the purpose of remedying or correcting by injunction, mandamus or other process any act of commission or omission in violation of the provisions of this Act or of any lawful regulation or order promulgated hereunder."

With the foregoing sections in mind let us examine the "license" issued to the District by the Federal Power Commission pursuant to and in accordance with the terms of the Federal Water Power Act.

It has been held that the "license" issued by the commission under this very act constitutes a contract between the United States and the "licensee".

Alameda Power Co. v. Gulf Power Co., 283 Fed. 606.

In a general way, the test to determine whether an agreement for the use of real estate is a lease or a license is whether the contract gives exclusive possession of the premises against the world, inclusive of the owner, in which case it is a lease, or whether it merely confers a license to occupy under the owner.

Certainly the agreement is something greater and broader than a mere license. A license is revocable at the pleasure of a licensor. (25 *Cyc.,* 645.) How is the agreement in question revocable? Is it at the pleasure of the licensor? An examination of the perti-

nent sections of the Act, to-wit, Section 6 discloses that the "licenses" may be revoked only for the, reasons and in the manner prescribed under the Act and Section 26 provides the government may institute proceedings in equity for the purpose of revoking for violation of its terms any "license" issued; it also provides that the government may correct by injunction or other process any act of commission or omission in violation of the provisions of the Act. The answer, then to our question is that the so-called "license" is not revocable at the pleasure of the "licensor". Clearly, if it were, there would be no necessity for the provision that the government may take legal proceedings for its cancellation, nor would its revocation be dependent on prior violation of its conditions. The government through the commission, is definitely limited as to the time and manner in which it may revoke the agreement and the only conclusion to be drawn is that in issuing the "license" the commission has granted rights, the power to revoke which has passed from it and must be determined by litigation. Therefore not being subject to revocation the agreement is more than a license.

Morrill v. Mackman, 24 Mich. 282, 9 Am. Rep. 124.

> "A license is a permission to do some act or series of acts on the land of the licensor without having any permanent interest it in. * * * It may be given in writing or by parol; it may be with or without consideration; *but in either case it is subject to revocation,* though constituting a protection to the party acting under it until the revocation takes place." (Italics ours.)

In *Coney Island Co. v. McIntyre-Paxton Co.,* 200 Fed. 901, wherein *Morrill v. Mackman,* supra, was

cited, the court, through Knappen, C. J., said at page 905:

> "We think it a misnomer to call the agreement before us a mere license. As construed below, it was intended to continue merely at the will of the plaintiff. It recognized an interest in defendant in the qualified use and possession of plaintiff's land. It was intended to constitute a limitation upon plaintiff's sole use and possession of its land, so far as inconsistent with defendant's qualified and concurrent right of possession, and to the extent necessary for the performance of the contract. It was not for an indefinite or permanent term, in a strict sense, but was to continue during a period whose limits were determined, although as yet uncertain in years. It pertained to the use of personal property, in whose beneficial use plaintiff was directly interested. It provided for action to be done on plaintiff's land for its benefit, not merely to be derived from its interest in the defendant, but through compensation to be paid directly to plaintiff for right to so operate. The defendant, moreover, as well as the plaintiff, was under express obligation to perform it. Such rights, we think (if effectively conveyed), amount to an interest in the land, as distinguished from a mere license. Stambaugh v. Smith, 23 Ohio St. 584, 591; Ormsby v. Ottman (C. C. A. 8), 85 Fed. 492, 497, 29 C. C. A. 295; 4 Words and Phrases, 3696 and following."

The fact that the Act calls it a license does not matter.

Denecke v. Miller, 142 Iowa 486, 119 N. W. 380.

> "We have no doubt that the arrangement made by Miller & Son with Terry, although called a license, was a lease. It was a subletting or underletting of a part of the premises, and, notwithstanding the paper signed by the parties names it as a license, courts will look beyond the form of the transaction to discover its true import."

The agreement in the instant case is one covering the use, occupation and enjoyment by the District of certain lands owned by the United States, wherein the District may impound water for reservoir purposes during the term of the contract. Section 9 (e) of the Act provides, *inter alia,* that the "licensee" shall pay to the United States reasonable annual charges to recompense it for the "use, occupancy and enjoyment" of its lands. The right to the occupation of the land covered by the contract is certainly exclusive as to any strangers to the agreement; if it were not so the agreement would be useless and without purpose. According to the terms set forth in Section 4 (a) the "licensee" must give the commission or its agents free access to the project at all reasonable times. It it be necessary, and it must be, for it is so provided by the Act, that the commission, the "licensor", or, as we claim, the lessor, obtain the permission of the "licensee", or lessee, to come upon the lands, then the contract gives the latter exclusive possession of the premises against the commission, which is the United States, the owner. Therefore we have an agreement by which is given to the District exclusive possession of these lands against the world, including the owner.

Section 6 provides the "licenses" issued under the Act shall not be for a period in excess of fifty years.

These three elements, viz., the consideration or rental, the right to possession and the definite term bring the agreement squarely within the rule laid down in the case of *Columbia Ry. Gas & Electric Co. v. Jones, et al.,* 119 S. C. 480, 112 S. E. 267, in which the question of whether the contract there involved was a

lease or a license was presented. In passing upon the point, the court said at page 271, (S. E.):

> "That this contract affects an alienation of the property of the power company and vests in the Columbia company an estate which is not less than a leasehold is beyond question. 'A tenant has been defined to be one who occupies the lands or premises of another in subordination to that other's title, and with his assent, express or implied.' 16 R. C. L., p. 531; Alexander v. Gardner, 123 Ky. 552, 96 S. W. 818, 124 Am. St. Rep. 378; Hawkins v. Tanner, 129 Ga. 497, 59 S. E. 225; 16 Am. & Eng. Enc. L. (26th Ed.) 164, 165; Wood on Landlord and Tenant, Sec. 1. The agreement embodies all the essential elements of a lease. There is (a) a grant of the possession and of the exclusive use and enjoyment of the power company's property (b) for a definite consideration or rental which is susceptible of being made certain, and (c) for a definitely expressed and certain term, which term is, 'in perpetuity' or until the agreement is terminated by default."

A leading authority on the question of the distinction between a license and lease is the case of *Alexander v. Gardner, et al.,* 123 Ky. 552, 96 S. W. 818. In this case the contract in question was held to be a lease against the insistence that it was a license and Carroll, J., stated:

> "* * * Under the contract in this case, the appellant had the right to occupy the land for three years in consideration of a stipulated sum and the privilege of erecting buildings, putting machinery on the land, and making roads and tramways to enable him to enjoy the premises for the purpose for which they were granted. He was not given the right to use the land except in the manner pointed out in the contract, nor is the use of the soil essential to create the relation of landlord and tenant. If a tenant has the right to enter

> upon the premises granted for a specified purpose, and to this extent may enjoy them, and he does this in subordination to the title of the owner and with his assent, and, as a consideration, pays money or other thing of value, or even without the payment of any consideration, the relation of landlord and tenant is created."

The analogy between the *Alexander* case and the case at bar is very clear. There the owner gave right to the use, occupation and enjoyment of the land in the same manner as the government gives it to the District in the case at bar. Furthermore in the *Alexander* case the lessee had the right to erect tramways, cabins, buildings and appliances necessary for the removal of the timber. In the case at bar the District has the right to erect such power houses, dams, conduits, waterways, etc., as it may deem necessary for the purpose of carrying out the rights it has under the "license". In the *Alexander* case at the expiration of the term of three years all of the refuse timber, barns, houses and other structures were to revert to the owner. So in the case of the "license", so-called, from the United States to the District, here under discussion the United States has the right at the end of fifty years to take back its premises with such structures on it as the District may have erected during the term of the agreement and, furthermore, it is agreed that at such time the government shall recompense the District for any and all such structures. It would seem, applying the reasoning of the *Alexander* case to the facts of the case at bar, that it is clear the agreement between the government and the District constitutes a good and valid lease, though styled a license.

Section 9 (e) of the Act provides for the expropriation to the government of excessive profits until such time as the state in which government lands may be situated shall make provision for the prevention of excessive profits or for the expropriation thereof to itself.

An analysis of this part of Section 9 (e) clearly shows that the government had in mind that the District was to enjoy some profits arising out of the use of its land and it therefore was to have in addition to the use, occupation and enjoyment, the actual benefit of the land.

In *Roberts v. Lynn Ice Co.,* 187 Mass. 402; 73 N. E. 523, the question arose as to the construction of the words "use and benefit of" which were incorporated in the agreement whereunder the defendant leased from the plaintiff certain property belonging to the latter.

The litigation arose over the question as to who should sustain the loss occasioned by fire on the premises, the defendant insisting that the agreement between the parties was a mere license and that therefore the loss should be borne by the plaintiff. In deciding the case the court stated as follows:

> "The question presented by this case, therefore, is the question of the construction of this instrument originally made by Roberts on January 29, 1898, and extended by the plaintiff, his widow, on January 27, 1902. By it, as originally drawn, Roberts 'does let to said Ice Company his ice business and privileges in * * * Lynn, at Flax Pond, with the use and benefit of his ice houses * * * for the term ending December 15, 1898 * * *'. The character of the instrument in the case at bar would hardly have been questioned had the thing

> let been the ice houses, in place of the 'use and benefit' of them and although the word 'use' is ordinarily employed when the owner contracts to give another person under him a right to occupy as a licensee, yet the words here are not 'the use of', but 'the use and benefit of', the ice houses, and the defendant took exclusive possession of them under the lease."

As stated before, a license is revocable at the will of the owner and nothing is necessary to terminate it but a declaration on the part of the licensor that the agreement between them is terminated instanter. To the contrary it is well settled and defined law that in the case of a lease, particularly where there is no definite term stated and also where the lessee holds over after the expiration of the term, reasonable notice must be given by the lessor to the lessee to quit the premises. The necessity to give such a notice to quit being one of the essential elements to terminate the relationship between lessor and lessee and it not being at all necessary in the case of a license it would seem that the presence of such a condition would clearly determine the agreement to be a lease rather than a license. So in Section 14 of the Act it is provided that upon not less than two years' notice in writing from the commission the United States shall have the right upon or *after the expiration of any license* to take over and thereafter to maintain and operate any of the projects defined in the Act.

It is clear from a reading of this Statute that the District has the right of possession to the government lands as against the owner, the United States, and furthermore that they shall not have to quit such

premises until they have been given reasonable notice so to do by the owner.

The fact that the presence of a provision for the serving of notice to quit determines an agreement to be a lease rather than a license was expressly decided in the case of *Shipley v. Kansas City,* 254 Mo. 1; 162 S. W. 137:

> "We have been somewhat troubled over the question as to whether the contract between Hodge and Hudson was a lease or a mere license. We have concluded that it was a lease * * *.
>
> The contract between Hodge and Hudson provided that the land was to be used for bill posting purposes. That would not of itself constitute a lease. But there are three things which mark the contract as a lease. It provides for a notice to vacate. That implies that Hudson was to have possession. Such notice was to be given in case Hodge wanted to use the land for other purposes. In the second place, a mere license implies that the licensor can use the land in any way not inconsistent with the license. But here it was clearly shown that Hodge parted with all right to use the land until after notice to vacate. Third, the parties in so many words provided for the payment of rent. The use of that term did not, of itself make it a lease. But the whole instrument taken together constitutes a lease and not a mere license."

The principle underlying all the foregoing decisions is that the actual provisions of the agreement between the parties is the determining factor in deciding the question of whether or not the agreement is a license or a lease.

In the case at bar the agreement is governed by the provisions of the Statute and is issued under and in accordance with the terms thereof. The agreement,

therefore, contains all of the elements necessary to constitute it a lease. Such being the case and the District both expressly and impliedly having the right to acquire the property by lease, the Board of Directors in making such a lease have performed a discretionary act in the exercise of their authority. Such an act is one with which the courts will not interfere and thus on the face of the complaint, it follows that the facts alleged do not constitute a valid claim in equity.

ANSWERING APPELLANT'S ARGUMENT ON THIS POINT.

Before passing from the point, however, we wish to call attention to a fallacy in the reasoning of appellant's brief wherein he urges that the Board is making a contract under which they give away or dispose of the property of the District, and are therefore acting beyond their authority.

On page 19 of the brief he cites a part of Subsection 5 of Section 12 of the Organic Act relating to the sale of surplus water and, in putting a construction upon this subsection, it is claimed by counsel that the only water that could be disposed of by the District to persons, firms, etc., outside the District is surplus water.

Counsel has overlooked the fact that immediately preceding the part of Subsection 5 of Section 12, which he cites, and being part of the same subsection, the District is empowered

> "to acquire, construct, etc. * * * within or without, or partly within or partly without, the District works for supplying the inhabitants of said District and municipalities therein, * * * with

> light, water, power, heat, etc. * * * also to purchase any of the commodities or services aforementioned from any other utility district, municipality or private company, and distribute the same."

It is respectfully urged that should the District purchase and operate water works situated partly without the limits of the District and which water works at the time of such purchase were already supplying water to people residing outside of the District it would not only have the power to distribute water to such people but it would be legally bound so to do whether or not such water be surplus. The disposal of water to people outside of the District, therefore, is not confined to such water as may be surplus and this was expressly decided in the case of *East Bay Municipal Utility District v. Railroad Commission,* 194 Cal. 603, where the Supreme Court of this State through Shenk, J., said at page 619:

> "The determination of the principal contention of the respondent in its favor and adversely to the petitioner's right to compel the valuation would be sufficient upon which to base a denial of the peremptory writ sought herein, but counsel appearing by leave of court and on behalf of the East Bay Water Company has advanced certain other objections to the right of the petitioner to proceed which seem to demand consideration at this time in order that further litigation involving the same questions may be avoided in the event the petitioner hereafter may become authorized to seek a valuation on the part of the Commission. It is insisted that if the petitioner has the legal right to demand a valuation by the Railroad Commission and if the Commission should make such valuation the petitioner would have no power under the Statute authorizing its formation to supply

water to territory and peoples without the district. The act provides that a municipal utility district shall have power 'to acquire, construct, own, operate, control or use, within or without, or partly within and partly without, the district, works for supplying the inhabitants of said district and municipalities therein * * * with * * * water * * * and to do all things necessary or convenient to the full exercise of the powers herein granted * * *. Whenever there is a surplus of water * * * above that which may be required for such inhabitants or municipalities within the district, such district shall have power to sell or otherwise dispose of such surplus outside of the district. * * *' Direct authority is thus given to the district to acquire property *without* the district, but because the power of the district to sell water without the district is limited to the 'surplus' it is contended that the valuation if made would be idle and of no avail, for the reason that the district has not authority under its organic act to furnish water outside the district except as the same may be surplus. The resolution of the board of directors of the district declares the necessity of acquiring the entire system, and that the same is indivisible and constitutes one system. In the same resolution the district declares that it would take the property subject to the duty to continue to supply the outside territory. The petitioner also sets forth the same facts and declarations in the petition herein. It is also further alleged that about ninety-three per cent of the water is supplied to people within the district and about seven per cent to people outside the district. Whether or not it be the declared policy of the district to continue such outside use, it would be its legal duty to do so as the successor of the East Bay Water Company (South Pasadena v. Pasadena Land, etc., Co., 152 Cal. 579 (93 Pac. 490), and cases cited). In that case the city of Pasadena was seeking to acquire the water works and system of the defendant corporation which was serving water users outside the city and within the corporate limits of the

plaintiff. The suit was brought to enjoin the defendants from transferring its properties. One of the questions presented was whether the city could acquire the property subject to the duty theretofore imposed on the water company to furnish water to the inhabitants of the plaintiff and be compelled to continue that service. It was held that the city of Pasadena could be compelled to put the water to the same use as the water company. It is true that the city of Pasadena had charter power to supply water to persons who lived outside the city limits, but it was contended that the supply of water outside its limits was not a municipal affair and therefore the city was subject to the limitations of the general law with reference to surplus water. It was held in effect that the supplying of water to outside territory under the circumstances was necessarily a matter incidental to the main purpose of supplying water to its own inhabitants. With reference to the duty of the city of Pasadena to continue the service and with reference to the character of the water as surplus water the court said at page 594: 'It will be obliged to put it to the same use as fully as that company is now compelled to do. Water which is in this manner dedicated to the use of an outside community cannot be at the same time surplus water subject to sale to others. The sale is already, in effect, accomplished. The city of Pasadena, with respect to this part of the water, will hold title as a mere trustee, bound to apply it to the use of those beneficially interested'. So in this case the petitioner would be acquiring the property outside the district as necessary or convenient to the full exercise of the granted powers and would be required to discharge its duties to the outside consumers as required by law. The petitioner has the power to acquire the works and system outside the district. If it should do so it would acquire such property subject to the burden or servitude of continuing the service and on no just principle could it continue to hold the property outside the district discharged thereof. (See

Hewitt v. San Jacinto etc. Irr. Dist., 124 Cal. 186 (56 Pac. 893.) To acquire the property with the burden so attached would not, therefore, be in excess of the powers of the district."

II.

THE MATTER IN CONTROVERSY DOES NOT ARISE UNDER THE CONSTITUTION OR LAWS OF THE UNITED STATES.

In support of this point we feel that counsel for appellees has effectively stated the argument. We wish, however, to supplement his answer to appellant's argument on this point by suggesting a further distinction of the authorities relied upon by appellant.

Appellant relies principally on four decisions of the United States Supreme Court, each one of which, to our mind, is distinguishable from the case at bar. Taking his authorities in the order in which they appear in his brief, we come first to the case of *Little York Gold Washing and Water Company, Ltd. v. Keyes,* 96 U. S. 199; 24 L. ed. 656. That case was before the court on a petition for the removal of the suit to the Circuit Court of the United States from the State Court of California where the action had been commenced. The suit was in the nature of a bill in equity to restrain plaintiffs in error from depositing tailings and debris from several mines in the channel of the river. The plaintiffs in error, in their petition for removal, claim the right to work, use and operate their mines and to use the channels of the river as the place of deposit for the debris under provisions of certain acts of Congress, which were claimed as a full

and complete defense to the action. Clearly the success of his claim depended wholly upon the construction of the Statutes, namely, the acts of Congress, which was a matter for the Federal Court to determine. Such construction was the actual issue of the case and did not arise in any collateral manner.

In the case at bar neither the appellant nor the appellees claim any right under the laws or constitution of the United States. To the contrary appellant claims that the appellee District, a municipal corporation of the State of California, has no power to accept the federal license and the appellee claims that it has such powers as are given to it by the Organic Act as enacted by the legislature of California. So, therefore, the real question is the construction of this Organic Act to determine whether or not the District has the power to make the contract with the government.

The next case cited by the appellant is *Binderup v. Pathe Exchance,* 263 U. S. 291, 68 L. ed. 308. That was an action brought against several defendants claiming that they were engaged in an unlawful combination and conspiracy in restraint of trade and commerce among several states, the same being a violation of that act of Congress commonly known as the Sherman Act. No argument is necessary to sustain the contention that such an action was one of federal jurisdiction, because, in order to determine the main issue, it was necessary to decide whether the acts complained of were a violation of the federal statute. No such situation confronts us in the case at bar, the only complaint here being that the District, through its board, is violating a statute of the State of California.

He next cites the case of *Siler v. Louisville N. R. Co.,* 213 U. S. 175, 53 L. ed. 753. In that case the bill filed by the company attacked the validity of an act of the legislature of Kentucky as being in violation of Section 1 of the 14th Amendment of the Constitution of the United States and of other amendments of the Federal Constitution. There the validity of the state statute was attacked, it being claimed that it was in violation of the Federal Constitution. Surely the Federal Court was given jurisdiction by such a claim as the real question at issue was whether or not the state statute violated the Federal Constitution; but in the case at bar the state statute, namely, the Organic Act, is not attacked nor is the agreement made by the District under the Organic Act attacked, as being in violation of any Federal Statute or of the Federal Constitution. The action of the District is attacked as being abusive of the discretionary powers of the Board of Directors.

The last case he cites in support of this contention is *Smith v. Kansas City Title Co.,* 255 U. S. 180. From appellant's own statement of facts in this case the question involved is readily distinguishable from the one at bar. The action was based upon the claim that the investment which the plaintiff was attempting to enjoin would be a waste of the funds of the defendant company, because the act of Congress creating the obligors on the bonds in which the company contemplated investing was unconstitutional and so the bonds were void. According to the complaint in that action defendant company was authorized to buy government, state or other bonds but could not invest in or buy any

such bonds not authorized to be issued by a valid law. The law authorizing the issue of the bonds in question was an act of Congress creating the federal land banks and joint stock land banks. Therefore the company not being allowed to invest in bonds which were not authorized by a valid law the real question presented was whether or not an act of Congress authorizing the issuance of these bonds was valid; we have no dispute with the holding that this presents an issue to be determined by the Federal Court.

In the instant case the appellant does not claim that the act of the United States under which the agreement is made with the appellee District is invalid or unconstitutional. Therefore the question arising in the Smith case does not come up here, nor does that case present any analogy.

CONCLUSION.

To summarize our views we respectfully maintain that the judgment of the lower court should be affirmed because

(a) The action taken by the directors of the District in accepting a license from the United States was within its power because the license in question is in legal effect similar to a lease and the District is given specific authority to take by lease

(b) No question is raised by the bill or the offered amended bill which is properly cognizable by the Federal Courts inasmuch as no attack is made upon the validity of any federal law and no claim is made

that any action taken by the District is in violation of any federal law, and

(c) For all the reasons urged in the brief filed by counsel for appellees.

We trust the court will condone our trespass upon its valuable time in consideration of the transcendent importance to our clients, Twohy Brothers Company and J. F. Shea Company, of a final legal affirmance of the action of the East Bay Municipal Utility District which culminated in the contracts between the District and the aforesaid contractors.

Dated, San Francisco,
November 17, 1926.

Respectfully submitted,

DeLancey C. Smith,
Amicus Curiae.